THE 14TH AMENDMENT AND SCHOOL BUSING

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BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-SEVENTH CONGRESS
FIRST SESSION
ON
THE 14TH AMENDMENT AND SCHOOL BUSING

MAY 14 AND JUNE 3, 1981

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THE 14TH AMENDMENT AND SCHOOL BUSING

THURSDAY, MAY 14, 1981

U.S. Senate,
Subcommittee on the Constitution,
Committee on the Judiciary,
Washington, D.C.

The committee met, pursuant to notice, at 9:30 a.m., in room 5110, Dirksen Senate Office Building, Senator Orrin Hatch (chairman of the subcommittee) presiding.

Present: Senators Biden, DeConcini, Thurmond, and Grassley.

Staff present: Stephen Markman, general counsel; Pete Ormsby, professional staff assistant; Kim Beal, assistant clerk.

Senator **Biden** [acting chairman]. The hearing will come to order.

It is a slightly unusual procedure for the ranking member of the full Judiciary Committee on the minority side to begin a hearing on a subcommittee on which he is not a member, but by way of brief explanation, Senator Hatch and I are both conferees on the budget markup over at the Capitol.

We have worked out a situation where I am going to give my opening statement and return to the budget conference where the Democrats need a little more help. By the time I am finished, Senator Hatch will be here to begin hearing the witness list.

I have an opening statement I would like to proceed with.

OPENING STATEMENT OF JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM DELAWARE

Senator **Biden**. In my 8 years in the U.S. Senate, no issue has consumed more of my time and energies than the question of court-ordered busing of students to achieve integration in our public school system.

It is, of course, a matter of great concern to the citizens of my State as well as many of the large cities in the North and Midwest where cases are now pending for metropolitanwide interdistrict remedies.

I use the words busing of students to achieve racial integration deliberately because I believe that the Federal courts have gone beyond their appropriate mandate in implementing the 14th amendment. The courts have taken it upon themselves to go beyond simply dismantling deliberate segregation as an illegal Government policy. They have gone on to attempting to force integration by reassigning students to achieve particular racial balances.

Part of the reason for such judicial activism in this area, in my opinion, has been the failure of Congress to develop effective remedies for eliminating segregation. The Federal courts have preempted the other branches of the Government in interpreting the equal protection clause of the 14th amendment, especially in the field of education.

Unfortunately, the vacuum created by the absence of leadership in the other two branches, and in State government, has drawn the courts into the busing issue to a degree with which even the courts themselves appear to be extremely uncomfortable.

The result is that even though a consensus is finally emerging in the Nation and in the Congress that the courts have gone too far with busing, especially in the Supreme Court's most recent opinion of *Dayton* v. *Brinkman*, it is extremely difficult to develop effective antibusing legislation.

It is difficult for two reasons. First, we want to stop court-ordered busing, but at the same time not undo the basic ruling in *Brown*. Nor do we want to prevent the alternative things that can be done to end segregation.

Second, it is difficult because Congress has deferred to the Court for so long in this area, the Court tends not to take seriously any legislation effort to restrict the Court. The Court tends either to find unconstitutional, or to interpret in such a manner as to make ineffective, all congressional legislative efforts in this area. In my judgment, it is by no means certain that the Supreme Court would arrive at any more satisfactory interpretation of some of the constitutional amendments that have been put forward on this issue.

I know this is a discouraging view for those of us who oppose busing, but it is a preface to my general point that we must keep trying. We have stopped administrative busing with the Biden-Eagleton legislation, and beginning with the so-called Biden-Dole legislation of several years ago, and continuing most recently with the Helms amendment in the last Congress, we are about to end the Justice Department's involvement in busing cases. Any legislation restricting court-ordered busing will be much more difficult.

Senator Roth, my senior colleague, and I have worked for many years for legislation that would effectively achieve that goal. I have been asked by Senator Roth to indicate that he concurs in this statement and that he shares the view that I am expressing.

In fact, in the last Congress, the Roth-Biden bill to end court-ordered busing came within two votes of passage in the Senate.

However, successive court decisions have made this legislation harder and harder to write and the effect of it somewhat more problematic.

At this hearing, we are going to hear from many distinguished Americans, many of whom have testified in the past when I was holding hearings—back in the good old days when we were in the majority—on the Roth-Biden legislation.

I will listen with great interest to what you have to say. For those portions which I am unable to attend, I will read the record. Especially in light of the recent Supreme Court decisions, I am very anxious to hear what our constitutional experts have to say about the workability of any legislative proposal for ending court-ordered busing.

I still believe it is not impossible to write such legislation. I congratulate the subcommittee and the subcommittee chairman for renewing the efforts to find a solution.

I cannot conclude without offering one final observation, an observation with which I believe the justices themselves would find it hard to quarrel.

At the heart of this issue lies a dilemma much more compelling and much more urgent than the legal and legislative dilemmas I have already described. Its ramifications are endless, but it can be simply stated: Court-ordered busing is a failure. Court-ordered busing does not achieve its goals, any of the several goals that people will say it was set out to achieve.

It is a failure for several reasons. First, it is a failure because it does not achieve its purpose. It has resulted in dismantling many good black schools as well as white schools. It has not generally benefited black or white students.

In metropolitan areas where it has been applied, it has gone a long way to ruin the American tradition of the neighborhood school. It has caused concern in white and black families and has caused them to flee from the public school systems altogether in many cases.

Increasing numbers of black students have been forced to attend formerly all-white schools, where they have encountered teachers unfamiliar with their needs, classmates who are often hostile and somewhat violent, and all too often, are in an atmosphere not calculated to improve the quality of education for anyone.

Not surprisingly, recent studies have shown no signficant improvement in the achievement of students who have been caused by court order to be bused outside of their original school into other communities and neighborhoods.

Certainly some combination of voluntary open enrollment, attractive curricula, teacher transfer and training, and equitable allocation of school funds would have been able to achieve better results.

Although court-ordered busing of black and white students has resulted only in negligible gains, if any, for students, busing has caused widespread inconvenience, anxiety, and resentment among many segments of the community affected by it.

In some cases, desegregation by busing has resulted in the consolidation of many schools into one large district. In these cases, local influence over and parental participation in the management of the schools have been replaced first by a district court judge and then by a distant impersonal school district administration in matters such as curricula design, educational methods, and expenditure of school funds.

In my own State, we have a situation where 70 percent of the State's school population is in one superdistrict. Until recently, none of them were elected. The entire school board was appointed. The school board was not answerable to any of the parents, black or white, in the school system.

More and more urban and suburban white families have reacted by placing their children in private schools or fleeing beyond the compass of the court order. This white flight from court-ordered busing has been documented in many studies, especially those by David Armor, who will testify here today.

The racial segregation of neighborhoods in the United States has resulted from many factors, including redlining and restrictive covenants, but also including differences in family income, property values, and individual preferences.

However, the courts have recently sought to establish racial quotas in student populations for each district for each school. The resulting collision between the quotas and the composition of neighborhoods formerly served by many schools, if it continues, means that there will no longer be any functioning neighborhood schools, in the many cities and suburbs of this Nation.

I do not believe this result is necessary and I do not believe it is good. Surely a remedy providing for desegregation of the Nation's school system must be available that is more consistent with the American tradition of local control of institutions, a remedy that would avoid disastrous effects of court-ordered busing and achieve the educational goals toward which all Americans strive for all the children in this country.

In conclusion, Mr. Chairman, let me say that no one I know of who has been active in this debate in the U.S. Senate in the 8 years that I have been here is suggesting that in a situation where it is established that authorities or a State or a municipality deliberately set up a system whereby they were attempting to preclude black students from attending a school they otherwise would have gone to—no one is saying that that practice should be allowed to continue. No one is suggesting that that is something that we should not deal with.

What we are suggesting is that when it is dealt with, it should be dealt with in a manner that goes to the cause of the problem. The idea that we should have an integrated society is laudable, and I support it; however, it is not constitutionally mandated to be carried upon the back of the educational system of the United States of America.

There is a difference between desegregating a segregated institution and integrating an educational system, a distinction we do not often make and a distinction, I believe, the courts have blurred over the years.

As I said, Mr. Chairman, unfortunately, and I mean this sincerely, I have spent more hours and more time in my 8 years as a U.S. Senator on this subject than any other.

However, in my opinion, it is an absolute disaster. I once said on the floor of the Senate that busing is the atom bomb of integration.

With your permission, Mr. Chairman, I will be in and out. I thank you for your time; I am only an ex-officio member because I happen to rank on the full committee.

I know you know of Senator Roth's interest in this subject. He is not here because of the Finance Committee. I am sure you will be pestered by both Senator Roth and myself as you attempt to develop some workable legislation.

I thank you again. I will go and protect your interests at the budget markup. Thank you very much.

Senator HATCH. Thank you, Senator Biden. We appreciate the passionate concern that you have on this particular subject and appreciate your starting this hearing and giving your opening remarks.

I apologize for being late, but I was at the budget conference between the House and the Senate. I will have to go back shortly. I also have a meeting with the majority leader in just a few minutes.

However, I would like to say a few words before we turn to our witnesses.

OPENING STATEMENT OF ORRIN G. HATCH, A U.S. SENATOR FROM UTAH AND CHAIRMAN OF THE SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. The Subcommittee on the Constitution today begins a series of hearings on the subject of school desegregation and forced schoolbusing. The issue of mandatory busing has, over the past decade, proven to be one of the most passionately, and I might add one of the most persistently, divisive issues throughout our Nation.

It has now been more than 25 years since the court in *Brown* v. *Board of Education* outlawed the doctrine of separate but equal. Public schools that were characterized by this doctrine would be required "with all deliberate speed" to rectify that situation.

It has now been more than 10 years since the court in *Swann* v. *Charlotte-Mecklenburg* sanctioned the use of forced busing as a remedy for still segregated or dual school systems.

Despite the passage of years, there is little evidence that forced busing has become any more widely accepted as an institution by large numbers of the American people.

The scope of today's hearing is extremely broad. We are not yet focusing upon any individual legislative vehicle relating to busing. Indeed, among the purposes of this and subsequent hearings will be to determine whether or not a legislative response is justified, and, if so, what particular legislative response.

Among the threshold questions that this committee will be pursuing are the following: What is a dual-school system? Is it one in which the school district has taken actions designed to establish racially identifiable schools? Is it one in which racially neutral actions adopted by a school district have resulted in racially identifiable schools? Or is it one in which forces acting entirely apart from public policy decisions have come together to produce racially identifiable schools?

What is the current law in this regard? What should be the law? What are the constitutional imperatives?

What has been the impact of the past congressional actions in this regard: The Esch amendment to prevent Federal agencies from implementing schoolbusing orders; the Byrd amendment to forbid appropriated funds from being used to transport students pursuant to schoolbusing plans; and the Eagleton-Biden amendment to limit HEW-ordered busing plans? Have any of these amendments had a salutory affect on the difficulties at hand? How have they been interpreted by the courts and the executive branch?

Has schoolbusing been successful in achieving its apparent objectives? In other words, has it worked? What is the state of social science evidence with respect to schoolbusing? Have minority and nonminority students benefited from busing? Have the benefits outweighed the disruptions and dislocations that busing has created? What has been the impact of busing upon parental and community involvement public schools?

Finally, what ought to be the future of schoolbusing as a means for desegregation? Are metropolitan busing plans necessary to curb so-called white flight? What are the alternatives to schoolbusing? What, if anything, should be done by Congress: a constitutional amendment, a limitation upon the courts to order busing, or perhaps a limitation upon the ability of the Justice Department to litigate schoolbusing?

The entire issue of schoolbusing has been a unique political phenomenon. Each new busing order mandated by the Federal judiciary has been accompanied by a wave of local protest and controversy: school boycotts, disruptive activites, racial animosities, and political turmoil.

Just as regularly, however, the passions seem to have subsided. Have they subsided—and there are few issues more important here in my opinion—because busing has gradually come to demonstrate its value, or because the protestors have voted with their feet by fleeing communities or by enrolling their children in private or parochial schools?

The schoolbusing controversy, in other words, is not a narrow controversy. Integrally involved here are issues that relate to the health of our public school system, and that relate to the extent to which the Federal Government is going to impose its own policy preferences and social objectives upon an often unwilling neighborhood or community.

We have an excellent group of witnesses today. They represent a broad cross-section of viewpoints on these issues. I very much look forward to today's hearing.

Our next hearing, for information purposes, is scheduled for June 3.

Our first witness today will be Mr. James Turner, the Acting Assistant Attorney General for Civil Rights.

It is my understanding that the Department, because of the continued absence of a permanent head, is still in the process of formulating administration policy in the area of schoolbusing.

I note, nevertheless, that the Department has been active on a number of fronts—St. Louis, Shreveport, Chicago—in participating in schoolbusing controversies. The St. Louis plan exchanging tuition payments for voluntary integration efforts, has been particularly controversial.

The subcommittee very much looks forward to your testimony, Mr. Turner, on behalf of the administration. We will take your testimony at this time.

If I could just mention again that I am supposed to be over in the Cannon Building at the budget conference between the House and Senate as a member of the Budget Committee, and as chairman of the Labor and Human Resources Committee. Also, I have to meet with the majority leader in 5 minutes. I apologize for these conflicts.

What I am going to do is try to get Senator Thurmond to come up and assist us, but during that time that I will be absent, I would like to have my staff take the testimony.

Senator Thurmond and Senator Grassley have asked that their statements be made a part of the record at this point.

[The material follows:]

STATEMENT BY SENATOR STROM THURMOND (R-SC) BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE JUDICIARY COMMITTEE REFERENCE HEARINGS ON THE FOURTEENTH AMENDMENT AND SCHOOL BUSING, MAY 14, 1981, ROOM 5110, 9:30 A.M.

MR. CHAIRMAN:

I want to thank the distinguished Chairman of the Subcommittee for beginning hearings on the subject of school busing.

As most people recognize, this is a controversial subject which has both ardent advocates and opponents. As time has gone by, however, I believe more and more people have reached the conclusion that busing of children away from neighborhood schools is not in the best interests of all concerned. The strains that are placed on families, schools, and local public officials to meet the requirements of busing orders have had a profound effect. A renewed look at this issue is timely and again I commend the Chairman for holding these hearings.

I am a cosponsor of S. 528, a bill to limit the injunctive relief courts may impose in busing suits. I support that bill because it is a move in the right direction. It would orient the actions of the courts and the Justice Department toward equal educational opportunity and away from racial quotas through forced busing.

I would be willing to consider any measure in this area that will make quality education for our children its primary purpose. I look forward to hearing from the witnesses who are with us today.

PREPARED STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Mr. Chairman: I can be here only a limited period of time due to the executive session of the Finance Committee, but I do want to thank you for holding these hearings.

Racial-integration-motivated forced busing of school children is a concept born of a noble cause, but I am afraid that we in Congress have been negligent in looking at two aspects of this that our constituents have been well aware of:

First, that forced busing, by undermining the concept of the neighborhood school does not achieve the educational goals that this concept is supposed to achieve, and

Second, when we choose children for school assignment based upon the color of their skins, we are raising very serious constitutional questions.

These are questions which must be examined by this Congress in a much more thorough manner than they have been before. These hearings are definitely a much needed part of that examination, and I look forward to studying the testimony of these witnesses.

Senator **HATCH**. I have just learned the meeting has been canceled. I am able to stay here and hear testimony.

Mr. Turner, we will turn the time over to you. We look forward to what you have to say and to asking you some questions.

STATEMENT OF JAMES TURNER, ACTING ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS, DEPARTMENT OF JUSTICE; ACCOMPANIED BY BRIAN HEFFERNAN, ATTORNEY, AND MURIEL MORISEY, ATTORNEY

Mr. **TURNER**. Thank you, Mr. Chairman.

Mr. Chairman and members of the subcommittee, my name is Jim Turner. As senior career attorney, I am Acting Assistant Attorney General in the Civil Rights Division for the Department of Justice.

As you initiate your inquiry into the issue of student transportation and school desegregation, the Attorney General thought it would be useful for me to describe to you the Justice Department's recent action in two important school desegregation matters which illustrate how our Department has sought to work with local school systems to make effective use of the full range of available remedies for unconstitutional school segregation.

I must make clear, however, as you indicated, that I am not authorized to present any administration policy views on school desegregation remedies. Nor can I present to you any legal or constitutional analyses of this issue on behalf of the Department. That role should properly be reserved for the permanent Assistant Attorney General for Civil Rights after that individual has been confirmed by the Senate and has had an opportunity to direct the development of the administration's policy positions.

Within those limits, I can describe to the committee briefly two major litigative actions which demostrate in the context of actual cases how a number of the tools to facilitate school desegregation can be used to fashion practicable solutions to very complex problems.

I have given committee counsel for the record, and to each member of the subcommittee, copies of papers we filed recently in the Federal district courts handling those cases in *Jones* v. *Caddo Parish School Board,* which is in Shreveport, and *Liddell* v. *the Board of Education,* which is in St. Louis. Both submissions are now the subject of district court considerations so it would be inappropriate for me to testify here on the legal predicate for these submissions.

I believe that our work in these cases clearly illustrates that we have been able effectively to enforce the Constitution as the courts have construed its requirements regarding school desegregation without relying on busing as a principal component of the remedy and by deferring, to the greatest extent possible, to the desires and interests of the affected local communities.

CADDO PARISH, LA., PLAN

Turning to the Caddo Parish, La., plan, on May 7, 1981, the Department of Justice and the Caddo Parish School Board filed in Federal court a consent decree settling a school desegregation suit that began 16 years earlier in May 1965.

The suit was initially filed by private plaintiffs under 42 U.S.C. 1983 to enjoin the continued operation of, in the words of their complaint, "a compulsory biracial school system" and the assignment of "students, teachers, and other school personnel—on the basis of race."

The Caddo Parish School Board and a number of individuals were named as defendants. In July 1965, the United States moved to intervene in the action under title IX of the Civil Rights Act of 1964. The U.S. Court of Appeals for the Fifth Circuit allowed and mandated this intervention in *United States* v. *Jefferson County Board of Education.*

In the 16 years that this matter has been pending there have been numerous orders, plans, judgments, appeals, modifications, and alterations of plans, including the July 1973 court-ordered implementation of a desegregation plan developed by a biracial committee appointed by the district court at the request of the United States.

Since 1976, the board and the United States have been involved in a protracted process arising from the board's attempts to have the school system declared constitutionally desegregated and the pending case dismissed.

We and the school board have engaged in extensive negotiations to develop a plan to resolve this suit without the necessity of further litigation. Those efforts moved very close to success this month when the parties filed with the court a consent decree embodying a plan to create a unitary, desegregated school system for Caddo Parish with its student population of 45,469, which is 55.1 percent black and the balance white. That plan begins at the beginning of the 1981-82 school year.

The key features of the plan are the following: First, the establishment of magnet schools to attract racially integrated student populations through innovative or special focus educational offerings. The board will establish procedures for application, acceptance, and admission to those schools consistent with assignment priorities spelled out in the decree to facilitate desegregation, siblings attending the same school, and program continuity for students in magnet schools as they proceed to higher grade levels.

Second is the creation of a laboratory school to be operated in conjunction with universities and colleges in the Caddo Parish area.

Third is the construction of a combination elementary-junior high school complex.

Fourth is some modification of attendance zone boundaries and grade restructuring.

Fifth is permission for any student who attends a school in which his or her race is a majority to transfer to a school where his or her race is in the minority, that transportation to be provided by the school system.

Sixth is the school board efforts to make any needed improvements in educational programs at the remaining one race and predominantly one-race schools which it will not be practically possible to desegregate effectively, and attempts to attract white students to those schools through the establishment of some special programs.

The plan requires the board to file with the court and the United States a yearly report which will include student enrollment statistics by race, a description of the progress of construction of the new elementary-junior high complex, and a description of efforts with respect to the remaining one race or predominantly one-race schools.

After the 1983–84 school year, the board may file a notice of compliance with the decree, and unless the United States believes the board has failed to comply, the board shall enter an order declaring the system unitary and terminate this case at long last.

Mr. Chairman, I wish to emphasize a few points about this consent decree. First, although it is a major step toward the resolution of a protracted legal dispute that has been costly to all parties concerned, it is not yet final. The decree is before the court. There is a 10-day comment period that began on May 7. If objections are raised to the plan, there could be further litigation.

Second, to address the matter of primary interest to this subcommittee, while the plan does involve some additional busing, the busing results, by and large, from other changes in the educational system such as boundary line changes, grade restructuring, and the employment of magnet schools. It must be pointed out that transportation already exists in the Caddo Parish school system.

Third, as I have indicated, the plan embodied in this consent decree involves a wide variety of approaches to school desegregation and is faithful in its priority of remedies to the requirements of the Equal Educational Opportunities Act of 1974, in which Congress set forth its view of the priorities of desegregation remedies.

Finally, I want to emphasize that the negotiation process that has led to this consent decree has been very delicate, and the agreements in the decree reflect many hours of good-faith work on both sides. The parties acknowledge that the elimination of all racially identifiable schools in Caddo Parish is impracticable.

At the same time, we are committed to the goals of maintaining the significant desegregation that has already been achieved and insuring that the burdens of additional desegregation are borne as equitably as possible by both black and white students.

ST. LOUIS, MO., PLAN

Turning to the St. Louis plan, this is another example of the Department's efforts to explore all avenues that may lead to a voluntary desegregation plan.

On May 4, 1981, the Department and the St. Louis City Board of Education filed with the U.S. District Court for the Eastern District of Missouri a proposed plan for the voluntary interdistrict exchange of students among the city of St. Louis and several suburban school districts.

The filing of the plan was the latest major event in a long history of efforts to desegregate the St. Louis public schools that began in 1972 with a class action by a group of black parents and their minor children alleging unlawful racial segregation.

At that time, the St. Louis public schools enrolled 105,617 students, of whom 68.8 percent were black. At the start of the current 1980-81 school year, the student population had declined to approximately 63,000, of whom 78 percent were black. The county enrolled at that time, this year, about 145,000 students of whom 19 percent were black.

Before describing the contents of the plan, I wish to set out briefly the recent events leading to the filing of the mutually agreed upon plan.

In *Liddell* v. *Board of Education,* the St. Louis litigation, the district court held that the State of Missouri shared liability with the city board of education for the unlawful segregation which existed in the St. Louis public schools. The court found the State "jointly and severally liable" with the city board for the "costs pertaining to the desegregation plan." The court held that "the State defendants stand before the court as primary constitutional wrongdoers who have abdicated their affirmative duty."

On December 19, 1980, the district court entered an order requiring the State to produce a voluntary plan wherein "the burden of financing will be borne primarily by the State of Missouri."

However, the State did not file a voluntary plan and the district court issued a second order on March 4, 1981, requiring the filing of a voluntary plan by the State, the city board, and the United States, jointly, if possibly, upon pain of contempt. Judge Hungate is sitting on that case in place of Judge Meredith who formerly handled it.

The plan which was filed this month is the result of several months of negotiations which began in March with the city school board, the State of Missouri, and the court appointed chairman of the St. Louis school desegregation committee.

The city school board has concurred in the plan and fully supports it. The State defendants have not concurred, and the suburban school districts have not yet taken a position on it. Therefore, the plan must be viewed as tentative in light of the prospect of significant further proceedings.

The plan has three broad segments: First, permissive interdistrict transfers to existing programs that already have or will have available space where the transfer would decrease racial segregation; second, magnet schools and magnet programs; and, third, part-time educational programs designed to bring together racially mixed groups of students from metropolitan area districts periodically for cultural, career, and academic programs.

The interdistrict transfer program has been carefully designed to insure, first, that transfers will occur only where there is space available in the host district; two, that the host district's racial percentage would be maintained within the "plan ratio"; and, three, that the host district would not bear any of the incremental costs of educating transfer students from other districts.

Additionally, each student transferring under the plan would receive from the State one-half year of tuition-free education at any Missouri State institution of higher education for each year completed in a host district.

The magnet schools would include programs for individually guided education, basic instruction, investigative learning, and visual and performing arts, all programs which have demonstrated appeal to students of all races.

The part-time educational programs will draw upon the cultural and educational institutions of the city to provide learning experiences beyond what is available in conventional classrooms.

The plan leaves unspecified a number of details about the extent to which transportation will be necessary for students participating in any aspect of the plan.

However, the plan's enumerated general policies and procedures insure voluntary transportation for students enrolled in the interdistrict transfer program who live more than 1 mile from the school site. The State will be responsible for any transportation costs of the plan.

While it is impossible at this point to place the precise dollar figure on the plan, we expect it will be less costly than a complete restructuring of the city and suburban schools with attendant transportation.

Mr. Chairman, this description of the St. Louis plan is necessarily quite brief. As I noted, the plan itself is still tentative. In fact, Judge Hungate is sitting today on some other aspects of the case and has scheduled hearings next week to begin taking up the voluntary proposals before him.

CONCLUSION

In conclusion, the St. Louis and Caddo Parish plans are offered for the committee's information as models of the innovative approaches that can be developed to insure that our Nation's schools conform to the Constitution's nondiscrimination mandate. No plan is a panacea. Each must be tailored to the individual circumstances of the particular district.

In this respect, it is worth pointing out that the St. Louis plan is dependent upon a phenomenon in St. Louis that well may be national in scope: declining school enrollments. These declining school enrollments allow school districts to close those schools that are in poor physical condition or are located in dilapidated areas and transfer students attending those schools in an effort to assist desegregation.

Declining enrollments also encourage school districts like the suburban schools districts in St. Louis to attract more students in order to avoid closing schools there.

The St. Louis plan is built on this phenomenon and illustrates the efforts of our Department to continue to take into account changing circumstances and local conditions to develop plans that encourage voluntary desegregation efforts.

I hope this information will be helpful to your review of this important matter. As I indicated at the start of my testimony, my comments on these cases must be limited by the fact that they are pending litigation. Within those constraints, however, I will be happy to answer any questions you may have about the contents of the plans or their factual basis.

Senator HATCH. Mr. Turner, thank you for your testimony.

I am only going to ask one question. Then we will turn the time over to Senator DeConcini to make a statement.

The question is: Can you give the subcommittee some idea as to when we can expect a coherent administration schoolbusing policy to emerge from the Justice Department?

Mr. TURNER. Not with any specificity, Mr. Chairman. The Attorney General has directed that a study be undertaken. It has begun. The completion of that will necessarily have to await the appointment of a permanent head of the Civil Rights Division. I think that matter is underway now. In the foreseeable future, we should be able to give the committee more help.

Senator HATCH. By "foreseeable future," do you think within the next month or so, or within the next 3 months?

Mr. TURNER. I would probably guess more on the 3 month than 1.

Senator HATCH. I see. As I understand it, the prospective nominee to head the Civil Rights Division is primarily a constitutional lawyer with fairly limited experience in the area of civil rights. Is that correct?

I guess that it is not fair to ask you that. My point is: Do you think that this might delay the development of policy?

Mr. TURNER. I think the efforts of a constitutional expert and scholar would be most welcome in this area.

Senator HATCH. I agree with that. I am not demeaning the choice. I think very highly of the nominee. I am just saying that his lack of close familiarity with civil rights law may delay the early development of policy in this area.

We have had many articles and books written on the subject of busing alone, not the least of which is "Disaster By Decree," written by one of our witnesses here today—Professor Graglia.

Thank you, Mr. Turner.

Senator DeConcini, do you have any questions.

Senator DECONCINI. Mr. Chairman, I have no questions of Assistant Attorney General Turner.

Senator HATCH. Why do we not permit the Assistant Attorney General to leave and take your statement at this time?

Senator DECONCINI. That would be fine. I just want to thank him for his statement. I was here to listen to most of it and did read it. It is a very good statement. I am glad to have it here.

Senator HATCH. If I could say one other thing: We will allow you to go now, but I would like to reserve the right to file written questions. I have a number of them I would like you to respond to and would like to keep the record open for questions from any of our colleagues on this subcommittee.

Mr. TURNER. I would be pleased to answer such questions.

Senator HATCH. Thank you so much.

Senator DeConcini?

STATEMENT OF DENNIS DeCONCINI, A U.S. SENATOR FROM ARIZONA

Senator DECONCINI. Mr. Chairman, I will be brief. I want to compliment you, Senator, for holding these hearings. I think the very complicated subject we are addressing today needs some thorough indepth testimony so we can, hopefully, focus in on a single direction, if there is such a direction.

In my four and a half years here, I have consistently supported all amendments which would restrict forced busing and the funding of it. I have been very frustrated by the continued activity of the Justice Department.

In the State of Arizona, we have had several cases, only one of which has been decided. It was a minimal forced busing plan, yet it caused a great deal of consternation and neighborhood unrest that, in my opinion, would not have been there had it not been for the Justice Department's determination to push such a suit.

I am pleased to see that the Judiciary Committee and the Subcommittee on the Constitution, under your leadership, is going to address the problem and make some earnest attempts to present a good, clear, concise record that forced busing has not been successful. And, perhaps we can find a solution that will guarantee that there is no discrimination in the public schools, as I think almost everyone in this body and certainly on this committee subscribes to that position.

Mr. Chairman, that is all I have to say. I look forward to hearing the testimony being given here today and reading that given during my absence. I will have questions for several of the witnesses for which I assume the record will remain open.

Senator HATCH. The record will.

Senator DECONCINI. Thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator DeConcini.

Our second witness will be Prof. David Armor, who is a senior social scientist at the Rand Corp. He has taught sociology at Harvard University and has been a consultant to the U.S. Office of Education and the U.S. Civil Rights Commission.

Professor Armor is the author of a large number of important studies on school busing and its effects, including his seminal study in 1972 entitled "The Evidence on Busing." He is also the author of a major study entitled "White Flight and the Future of School Desegregation," as well as numerous other surveys in this area.

Dr. Armor has participated as a witness in some of the most important school desegregation cases.

This subcommittee, to say the least, is honored to have you with us, professor. We are looking forward to taking your testimony.

Your complete statement will be made a part of the record following your oral presentation.

STATEMENT OF DR. DAVID J. ARMOR, SENIOR SOCIAL SCIENTIST, RAND CORP.

Mr. **Armor**. Thank you very much, Mr. Chairman. I am very pleased to be here to express the views on a situation that I have been studying for some 10 years.

Senator **Hatch**. If possible, we would like our witnesses to summarize their prepared testimony within 10 minutes if they can, although we are flexible.

Mr. **Armor**. I will certainly attempt to do so.

This issue has been with us now for more than a decade and it shows no sign of abating. The recent court ordered busing that started in Los Angeles, Columbus, Ohio, St. Louis, and major busing lawsuits that are pending in Cincinnati, Kansas City, Indianpolis, and San Diego show that the issue is alive and well. I think it is a remarkable achievement, indeed, for the most unpopular, least successful, and most harmful policy since prohibition.

I agree with Senator Biden's earlier statement that there is no question here about the Supreme Court's decision in *Brown*. Intentional segregation in the schools is prohibited by the Constitution. The real issue is the method of remedy that the court has chosen, mandatory busing, which they believe, or they originally believed, would end racial isolation and eliminate the harmful effects of segregation.

At this point in history, however, I think the record is clear. There is more complete evidence and more experience that shows us that, as a feasible remedy, mandatory busing has failed. It has failed first because public opposition and white flight in many cases have been so massive as to increase rather than decrease segregation.

Second, desegregation has not produced many of the educational and social gains that have been promised.

Third, by rejecting a neighborhood school policy, the courts have deprived parents of a traditional right to choose schools close to home.

The basic problem today, and the problem faced by the Congress, is that the courts have not accepted these recent facts and the evidence on the failure of mandatory busing.

I think it is essential that if the courts continue to ignore the facts, the Congress is going to have to take action to solve the problem.

Today, I would like to mention a few things that might help the committee's deliberations. First of all, I would like to talk about what has happened in Los Angeles, which is perhaps the most dramatic illustration of the failure of mandatory busing. I would like to mention a few other recent studies that demonstrate the failure of desegregation and mandatory busing to bring about educational benefits.

Finally, I would like to mention a few things that I think the Congress might consider in trying to fashion a more reasonable policy in this area.

WHITE FLIGHT IN LOS ANGELES

In Los Angeles, mandatory busing began in 1978. A remarkable amount of white flight took place. Of the 20,000 white students that were to be bused in that original plan, 60 percent did not show up at their receiver school.

As a result, most of the minority schools remained segregated. In spite of this massive white flight in Los Angeles, in 1980, the State court judge ordered an expanded plan. He did not ignore white flight, but rather than eliminate mandatory busing, which was the cause of the white flight, the judge simply cranked in a 50-percent white flight factor leading to one of the more bizarre busing plans in the history of desegregation. Clusters of five and six and seven white schools had to be combined with one minority school in order to guarantee enough white students to desegregate that one minority school.

Even so, in the 1980 expanded plan, the busing did not desegregate most of those schools. Over half of those minority schools in the plan had fewer than 30 percent white students, again because of white flight.

Between 1976 and 1980, Los Angeles lost nearly 100,000 white students, from a little over 200,000 to a little over 100,000. Not all of this loss, of course, was due to busing. There are demographic factors in most big cities that cause a decline in white enrollment.

Senator HATCH. May I interrupt you?

Mr. ARMOR. Certainly.

Senator HATCH. I did not know that. The city lost 50 percent of their students in that period of time?

Mr. ARMOR. In 4 years, the 4 years between the first order and today.

Senator HATCH. Fifty percent of the white students.

Mr. ARMOR. Almost half were gone by 1980. That is correct.

Senator HATCH. In other words, you are making the point that what schoolbusing is doing is segregating rather than integrating.

Mr. ARMOR. That is precisely correct. Not all of those white students were lost due to busing because of demographic declines.

Senator HATCH. Where do you get these statistics?

Mr. ARMOR. I have been studying the Los Angeles case in particular for the past several years. I testified in that case. We have done demographic studies to show us what the natural or normal trends would have been, had busing not occurred. We compare that with what actually has happened. Plus, we have the actual number and percentage of white students who do not show up when they are ordered to participate in the busing plan.

Senator HATCH. If I interpret this correctly, you are saying that busing not only is not the solution, it actually aggravates the problem.

Mr. ARMOR. It makes more segregation.

Senator HATCH. Am I misconstruing what you are saying?

Mr. ARMOR. You are absolutely correct.

What is happening, in fact, is we are increasing segregation not only between the central cities and the suburbs, but also between private and public schools.

Senator HATCH. This may be a simplistic question, but it is an inevitable one. If that is so, then why are so many minority individuals enthusiastic about schoolbusing, or at least the black leadership?

Mr. ARMOR. It is a bit of a mystery to me. I think many black leaders have been convinced that it is the only way to obtain educational benefits for minority students.

However, what continues to puzzle me is how the NAACP and the ACLU in Los Angeles can pursue mandatory busing remedies when there are virtually no whites left in a community.

Senator HATCH. You cannot force white kids to integrate with black kids if there are not any white kids left in the community?

Mr. ARMOR. That is precisely correct.

Senator HATCH. What you are saying is if this continues and forced busing becomes a greater reality, we might have to integrate on the basis of State jurisdictions rather than city, county, or municipal jurisdictions?

Mr. ARMOR. That might be a strategy in mind. As soon as the whites are gone from the central city, then we will expand the busing and include the suburbs, and possibly the private schools.

Senator HATCH. Do you think that would work any better than intracity or intracounty busing?

Mr. ARMOR. I think metropolitan plans to involve the suburbs would, in fact, cut down the white flight. However, what we see happening in Los Angeles and other cities that I have studied is there is increasing reliance now on private schools as the way to flee from mandatory busing.

I think if you look at Louisville, Jefferson County, you will see a phenomenal increase in private schools. I think you are dealing with a public opposition that will not go away. If you bring the suburbs into this plan, in the long run I think you will simply increase private schools.

Senator HATCH. I am sorry to interrupt you again, but do you think that this is the major reason for the upsurge in private school attendance in America, or is it because people are discontented with public schools in general?

Mr. ARMOR. In many cases, I think it is the last straw. I do agree that there are serious concerns with American citizens about the public schools, especially the issue of discipline and the issue of not feeling in control of what is happening.

When a court comes in and takes over the school district, I think that simply exacerbates an already existing problem. I do not think it is a coincidence, however, this change, a reversal in trends of declining private school enrollment, being turned around the very year that busing starts.

In Boston, for example, private school enrollment was declining, and the share of white students in private schools was actually declining. As soon as busing started, there was an incredible surge in enrollment in private schools. Now, in Boston, 50 percent of the white students are enrolled in private schools.

COURT ACTIVISM

Senator HATCH. I am sorry to interrupt you again, but these thoughts just come to my mind as you are testifying about this.

As a member of the Judiciary Committee, and having sat through the nomination of 365 judges in the last 4 years by the prior administration—many of them actively committed to judicial activism—I am concerned about the impact of these new judges upon school desegration policies.

Do you expect this to have a dramatic impact on the problem? Do you anticipate we will have more problems with these "activist" judges?

Mr. ARMOR. I think in some respects the courts are out of control in regards to school policy.

Senator HATCH. This is as a result of intensive study of the area?

Mr. ARMOR. Intensive study, and, in fact, very recently in Los Angeles, the judge responsible for this disastrous plan, when the State supreme court overruled his last plan—I will not go into the complexities since it is in my statement about the Los Angeles case, but it is under State law and not Federal law. The State court judge resigned when busing stopped in Los Angeles.

Although in one statement he said he was burned out, in fact he has been on a campaign attacking the school board and claiming the school board is, in effect—my own term—racist, that the school board only cares about white students.

There is no question in my mind that judges like Judge Egly in Los Angeles are idealogically committed to a certain policy. They are not concerned about what damage they do to the public school system. They are simply committed to a preconception. It is a disastrous policy. Since he lost, in Egly's case, he resigned.

Senator HATCH. They are not committed to the principal of stare decisis, or judicial precedent.

Mr. ARMOR. I think that originally, and I think even now, judges are concerned about discrimination. Discrimination does exist. Segregation of the illegal sort does exist.

However, I think somehow once the momentum begins and we set into motion the process of taking over a school district, it simply has gotten out of proportion to what was intended. I think they may be sincere, but I do not understand how a judge can order a plan after he has seen 2 years of massive white flight and massive failure, how, without great concern, he can simply order more of it. I mean something is wrong somewhere.

Senator DECONCINI. Mr. Chairman, would you yield? I would just like to follow up on a question.

Senator HATCH. Surely.

Senator DECONCINI. Not to defend the judges you have mentioned because I agree with you in that I think they are activists and out of control, but on the other hand, would you agree, Mr. Armor, that much of it is due to the failure of school boards and the failure of local government to do something about the problem of de facto segregated schools?

I know in the Tucson Unified School District case, we had a nonactivist judge who finally came to some conclusions. He did not know what else to do. I happened to know him. He has since passed away, but I happened to talk to him about that case. He did not know what else to do. He felt as though the school board had not done enough. He granted a very small amount of busing, which was detrimental indeed.

I wonder how much of this is the fact that the judges are not administrators and, for some reason, they feel that busing helps the matter. But is not part of it the local government not responding to the problem?

Mr. **Armor**. There is no question that in some cases the local school boards have been very intransigent about desegregating the schools.

Senator **DeConcini**. If that is the case——

NEIGHBORHOOD SCHOOL POLICY

Mr. **Armor**. If I could finish, I think that we do not have a situation like we did in the South originally where we had State mandated segregated schools. What we have are housing patterns and neighborhood segregation that is at issue. We have some specific violations of school boards such as gerrymandering or optional attendance zones.

The problem is that the courts do not want to simply remedy those specific violations. The courts, I think, have become convinced that racial balance is the goal, even though the Supreme Court says racial balance is not the goal. In every single plan of mandatory busing that I know of, that I have studied, the judge ultimately tries to bring about a certain amount of racial balance.

I think if we have a neighborhood school policy, if we accept that that is a traditional way of assigning students to public schools, then there is going to be a certain amount of segregation. Judges are not prepared to accept that. The Supreme Court has not sanctified the neighborhood school even though that is the preferred arrangement of the vast majority of citizens.

Senator **DeConcini**. Are you satisfied that, say, in the Los Angeles school busing case, the Los Angeles school district did the best they could in your judgment?

Mr. **Armor**. Without abandoning the neighborhood school policy, I do believe so. They had a very successful voluntary busing program that involved some 20,000 minority students. They had a very successful magnet school program.

Senator **DeConcini**. The court should have stayed out of it?

Mr. **Armor**. In my opinion, that is exactly the problem. The courts are not prepared to accept neighborhood schools if it leaves some segregated schools in place.

Senator **DeConcini**. Thank you, Mr. Chairman.

Senator **Hatch**. Professor, Senator DeConcini is going to continue to conduct the hearings. I have to leave, unfortunately. We are just about ready to vote in the conference on the budget resolution conflicts between the House and Senate. We may very well resolve the problem in the next few minutes and proceed to reconciliation this afternoon.

If you will do that for me, Senator DeConcini, I would appreciate it.

I hate to leave Dr. Armor because I am interested in your testimony as well as our other witnesses today. I apologize again.

Senator DeConcini [acting chairman]. Please continue, Mr. Armor.

Mr. Armor. I think the questions and answers have covered a lot of the ground I wanted to cover in the area of white flight.

ACADEMIC ACHIEVEMENT

Let me mention a couple of other areas that I think are important to consider in terms of where the courts perhaps went wrong in the neighborhood school policy and in believing that racial balance had to be obtained in most schools.

I think there has been a strong set of beliefs from the original *Brown* decision to the present time that equality of opportunity can only be accomplished by providing a desegregated school situation. As long as you believe that, then of course it is going to bother a judge or a court whenever any plan leaves some segregated schools.

I think that this harmful effect of segregation, or the belief in it, is harmful for race relations and harmful for the academic performance of minority students.

I think there is an abundance of evidence now as we look and review what has happened that desegregation, per se, does not improve race relations in a substantial and consistent way. Desegregation does not improve in a significant and consistent way the academic achievement of minority students.

There is one very excellent study on the achievement issue that was done a couple of years ago, a review of 129 studies by a doctoral student at Western Michigan University. This study is distinguished from some others you may hear about today in actually estimating the size of the effect of desegregation on achievement.

Many studies that have been done recently have concluded that there is a positive effect of desegregation on achievement, but that effect size has not been estimated. Dr. Krol's study estimated the effect. It was very small, although positive, favoring desegregation, but very small and not what we call statistically significant.

In my opinion, the Krol study is perhaps the most definitive work on achievement and desegregation at the present time.

RACE RELATIONS

In the area of race relations, a very important study was completed a couple of years ago by Professor St. John of the University of Massachusetts. What she found was really quite surprising. When we look at the more rigorous studies done in this area, we find that a majority of them show that race relations are harmed in desegregated settings, or at least desegregated schools settings brought about by desegregation policies of various types.

I think some of the reasons why it might be harmful are revealed in a recent study by Professor Patchen at Purdue University, who studied Indianapolis public schools and found that the level of aggression was very different between black and white students.

It was not so much a discriminatory thing, that is black students were as aggressive toward their own race as they were toward white students, but the level of aggression was higher on the part of minority students.

It does not mean that desegregation always has to lead to a negative result, but it does illustrate the complexity of race relations and the fact that we do not really understand the conditions that we have to bring about in the schools to make a positive race relations experience. Not only do social scientists not know, but the courts do not know how to do that.

Finally, let me just mention, while on this social science area, the issue of neighborhood schools. There is no question that the courts have used certain violations of the Constitution as a trigger to bring about a districtwide desegregation plan.

The way this is done legally is to hold that various specific school violations might have been responsible for all of the housing patterns that exist in that community. Without that connection that the schools might somehow have had an effect on housing, it is very hard to see a legal justification for a citywide busing plan that produces a lot more integration than would have occurred in the absence of these specific violations.

I think what I am saying here is it certainly appears to social scientists who study housing patterns that there are more factors involved than school segregation in bringing about housing segregation, and in cases of citywide busing, like Denver, Omaha, Milwaukee, basically the remedy of citywide busing far exceeds the actual violation that was proven by the court.

WHAT CONGRESS CAN DO

Let me close with a few suggestions that have grown out of my experience in this field for what might be done. My criticism of mandatory busing does not mean that Government agencies should abandon desegregation or that parents should not participate in them.

I think the basic values of America demand that we work for an integrated society. However, those same values, I think, determine the legitimate methods for ending segregation.

In the absence of evidence that mandatory busing works, it is neither just nor equitable, I think, for courts to impose it upon citizens who oppose it.

I think some of the facts I have discussed are not really new to the committee. I think the concern of the committee is not whether the policy has failed. I think probably a majority of the Congress might share that view. But rather it is how to change the policy.

I think the simplest solution, I suppose we all would agree, is that the Supreme Court change its policy on mandatory busing. There are a number of justices who have dissented in recent cases, such as the *Dallas* case. These Supreme Court justices indicate that they think there needs to be a comprehensive review of mandatory busing policy.

Unfortunately, the current majority, if we look at the decision on *Columbus* and *Dayton*, a very recent one in 1979, is not ready to abandon mandatory busing.

I agree with your colleague, Senator Moynihan, that the Supreme Court does eventually correct its own mistakes. The problem is, if it takes the Court as long to correct this one as it did to correct the separate but equal mistake, some 60 years, our public schools may never recover.

I think there are many legal scholars who claim that the Court got involved in the first place because legislatures did not act. I think perhaps it is time once again for legislatures to take a very affirmative and strong role.

What we need, I think, is a division of power that we recognize in other areas of law where legislatures set the types and ranges of penalties for various infractions and the courts actually determine whether an infraction has occurred and select the specific remedy.

Now the Congress has passed legislation before, such as the Equal Educational Opportunities Act of 1974. However, this legislation included clauses that specifically exempt the courts from abiding by that legislation if the 14th amendment is involved.

I think that any future efforts have to avoid the pitfalls of the past and would have to confront very directly the issue of proper separation of powers between the courts and the Congress.

What I would recommend is that the Congress consider affirmative legislation, remedial legislation, to be used whenever a school violation is found. This legislation should also be very careful to require the courts to tailor the remedy imposed with the specific violation. Even in a voluntary plan, if one does not have a school-district-wide violation, then there is no reason for a school-district-wide remedy.

Also, I think the Congress has to confront the division of power directly. There are constitutional authorities, some of whom you will hear from today, who are more expert than I am on this issue of whether Congress has this authority.

However, I think the issue is not really whether Congress has the authority to regulate the remedies for constitutional violations in this area. The basic problem, I think, is the excessive legislation of the courts to change the way students are assigned to schools.

If the Congress devises fair and reasonable methods to separate powers, and if the Supreme Court ignores that legislation, then I think the Congress has a very strong case to take back to the people for an amendment to the Constitution that would guarantee a proper division of powers and an end to busing.

Thank you very much.

[The material follows:]

DAVID J. ARMOR, Ph.D.

Dr. Armor is a Senior Social Scientist at the Rand Corporatin in Santa Monica, California, where he conducts policy research in the fields of education, military manpower, and health. His essays on desegregation include "School and Family Effects on Black and White Achievement," (Mosteller and Moynihan, On the Equality of Educational Opportunity); "The Evidence on Busing" (Public Interest); and "White Flight and the Future of School Desegregation" (Stephan and Feagin, School Desegregation).

As an expert witness Dr. Armor has prepared studies and testified in a number of school desegregation cases including Dallas, Pasadena, San Diego, Atlanta, Omaha, Milwaukee, Seattle, Los Angeles, and Pittsburgh. He has also testified before U.S. Senate and House Committees on desegregation issues, and attended a special White House conference on desegregation policy.

Prior to joining Rand in 1973 Dr. Armor was Assistant and Associate Professor of Sociology at Harvard University. While at Harvard he consulted for the U.S. Office of Education's study on the "Equality of Educational Opportunity" (the Coleman report), consulted for the U.S. Commission on Civil Rights in the preparation of "Racial Isolation in the Public Schools," and conducted an evaluation of a voluntary busing program in Boston.

Dr. Armor received his Ph.D. in Sociology at Harvard University in 1965, which he entered as a Woodrow Wilson Fellow. He received his B.A. in Mathematics and Sociology at the University of California, Berkeley, where he also served as student body president and earned highest honors in Sociology.

STATEMENT OF DAVID J. ARMOR *

Mr. Chairman and members of the Committee: I am pleased to be here today to share my views on the critical issue of school busing.

The school busing issue has been with us now for over ten years, and it shows no signs of abating. Massive mandatory busing has been ordered recently by courts in Los Angeles, Columbus (Ohio), and St. Louis; and major busing lawsuits are still pending in San Diego, Cincinnati, Kansas City (Missouri), and Indianapolis. Clearly, court-ordered busing is alive and well. This is a remarkable achievement for the most unpopular, least successful, and most harmful national policy since Prohibition.

At the outset let me say I fully agree with the Supreme Court's policy that intentional segregation of the schools is prohibited by the United States constitution. Moreover, racial isolation and discrimination do exist in American society and in the schools, and these conditions should be combated wherever they are found.

The real issue is the method chosen by the courts to remedy segregation. The courts adopted mandatory busing because they believed it to be the most effective way to end racial isolation. Therefore, it was also seen as the best way to end the harmful effects of segregation on race relations and on the educational opportunity of minority students. But, just as Prohibition was not a feasible remedy for alcohol abuse, so mandatory busing is not a feasible remedy for school

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* This statement is not prepared in connection with a Rand contract or grant; the views expressed herein are the author's own, and are not necessarily shared by Rand or its reseach sponsors.

segregation. Like Prohibition, the policy is not merely ineffective; it is counterproductive.

The federal courts were no doubt sincere, originally, in believing that mandatory busing was the only feasible method for reducing racial isolation and alleviating the harmful effects of segregation. By 1970 voluntary methods had not worked well, and many school districts were maintaining dual school systems with only token efforts to integrate. Encouraged by the positive views of social scientists on the benefits of integration, and realizing that because of housing patterns a neighborhood school policy would leave many segregated schools, the courts finally took the more drastic step of ordering mandatory busing.

At this point in history, however, more complete evidence shows us that mandatory busing has failed as a feasible remedy for school segregation. It has failed, first, because public opposition and white flight have been so extensive as to increase, rather than decrease, racial isolation in many cities. It has failed, second, because desegregation has not produced the educational and social benefits it had promised. Therefore, it not only fails to truly desegregate, it fails to remedy the presumed effects of segregation.

Mandatory busing fails, third, because it is not an equitable remedy. By rejecting a neighborhood school policy on the grounds of housing segregation, the courts deprive parents of their traditional right to choose schools close to home. Since it is unreasonable to hold schools accountable for housing patterns, the extent of the remedy far exceeds the scope of the violation.

The basic problem is that the courts have not yet accepted these facts.[1] The facts themselves are frequently obscured by a reluctance to discuss them, perhaps out of fear of being accused of prejudice or racism. It is time to use these facts to make a realistic assessment of mandatory busing, to admit its failure, and to take action. If the courts continue to ignore the facts, then the Congress should take the initiative.

LOS ANGELES AND WHITE FLIGHT

After some 10 years of legal battle in the state courts, mandatory busing began in Los Angeles in the fall of 1978. Although the plan was limited to grades 4 through 8, the effects were devastating on those schools in the plan. An astonishing 60 percent of the 20,000 bused white students never showed up at their receiving school, and some individual receiver schools lost over 80 percent of the bused white students. Most of these students moved to the suburbs or transferred to private schools. As a result, most of the minority receiver schools remained segregated. If these figures sound shocking, consider the geography of Los Angeles: white and minority concentrations live so far apart that the average bus ride was nearly 50 minutes one way, and some bus rides actually lasted 90 minutes!

In spite of this white flight, which continued in 1979, and in spite of state law requiring only "reasonable and feasible" desegregation plans, in 1980 the state court judge ordered an expanded busing plan to include grades 1 through 9. The court did acknowledge the existence of white flight. But rather than eliminate mandatory busing, the cause of white flight, the court merely allowed for a white flight factor of up to 50 percent when designing the 1980 plan. This led to one of the more bizarre desegregation plans in the history of school busing: in some cases four or five white schools had to be clustered with a single minority school in order to end up with enough white children to desegregate the minority school.

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[1] Supreme Court Justices Powell, Stewart, and Rhenquist have expressed concern about massive busing plans in a recent dissent (Estes vs. Metropolitan Branches of Dallas NAACP, 444 U.S. 437, 1980).

Notwithstanding these extreme steps, the 1980 plan still failed to desegregate most minority schools in the plan (see Table 1). More than half ended up with white enrollments under 30 percent, and most of the rest had less than 40 percent white enrollments.[2] A high price was paid for this token increase in integration. Between 1976 (the year before the first court order) and 1980 Los Angeles white enrollment declined from 219,000 (37 percent) to 125,000 (24 percent). About half of this loss is due to normal demographic factors, such as declining white births. But nearly 40,000 white students fled the district because of busing.

Fortunately, this new plan did not last. On April 20 of this year, mandatory busing came to an end in Los Angeles, the first time this has ever happened in a major city that had begun court-ordered busing. I wish I could report that the dismantling of busing was due to a rational recognition of its failure, but I cannot. As the Committee may know, Los Angeles has been operating under a state Supreme Court order requiring desegregation regardless of cause. In 1979 the voters of California passed Proposition 1, which prohibits court-ordered busing except when ordered as a remedy for violating the federal Constitution (14th amendment). A state appeals court has ruled that Proposition 1 is constitutional, and moreover that Los Angeles has not violated the federal Constitution by intentional segregation policies. Many experts were shocked when the state Supreme Court, which is responsible for California's busing policy in the first place, let the appellate ruling stand. No one was more surprised than the trial court judge who fashioned the Los Angeles plan, who promptly resigned.

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[2] All but one of the minority schools ending up with over 40 percent white had more than 20 percent white in their natural residential enrollment.

Unfortunately, this does not end the matter for Los Angeles. A new lawsuit has been filed in federal court by the NAACP, and if recent cases are any indication, the federal courts could very well reinstate busing in Los Angeles by next Fall. In fact, the federal district judge who will hear this case tried to prevent the dismantling of busing just two days before it was to end, on the grounds that the NAACP's claim of intentional segregation "had merit." The trial court was overruled by the 9th Circuit Court of Appeals on procedural grounds, but a final determination will not be made until a full hearing is held.[3]

White flight from mandatory busing is not confined to Los Angeles. Massive white flight has occurred in nearly every central city undergoing court-ordered mandatory busing, but the federal courts have paid little attention. Boston public schools, which began busing in 1974, have dropped from 57 percent white to only 35 percent white today; Denver schools have likewise dropped from 57 to 41 percent over a similar period. Although some of this white decline is due to natural demographic factors, analysis shows that about half of it has been caused by the busing (see Figure 1).

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[3] As further testimony to the bitter emotions raised by busing cases, even among judges, a dissenting 9th Circuit Court judge accused the majority of "scanty reasoning" and "precipitous" action, prompting the majority to release an unusual supplemental memorandum, chiding their dissenting colleague for "reckless charges" and "intemperate, emotional outbursts". In his written statement, the dissenting judge, who has not yet officially heard the case, accused the Los Angeles School Board of being "the worst discriminatory offender in the nation."

These facts were before the Supreme Court prior to their recent decisions in Columbus and Dayton, but mandatory busing plans were approved for these cities nonetheless. Dayton public schools have dropped from 53 percent white to 43 percent since busing began and Columbus is headed in the same direction, having lost 17,000 white students (out of 64,000) in the three years since they were ordered to begin busing.

In recent years a significant fraction of persons, perhaps up to half, have fled busing by transferring to private schools. In some instances this has contributed to a reversal in the decline in private school enrollment, and in fact has produced significant increases in the share of all white students enrolled in private schools (see Figure 2). In Los Angeles, for example, the proportion of all white students in private schools increased from 23 percent in 1974 to 43 percent in 1980. Between 1978 and 1980, the first three years of busing in Los Angeles, private schools experienced a massive increase of over 20,000 students. In Boston, the share of all white students enrolled in private schools has reached 52 percent, up from 34 percent before busing.

The trends in private school enrollment can only be reinforced by Professor James Coleman's new study, which finds that private schools produce more academic gains than public schools, even after controlling for the socio-economic background of parents [4]. The danger of continued mandatory busing is an acceleration of racial segregation, not only between city and suburb, but between predominantly minority public schools and predominantly white private schools.

BUSING AND REMEDY

In order for the courts to justify mandatory busing as a feasible remedy for school segregation, it must have two properties: first, it must truly desegregate by reducing segregation where other methods fail; second, it must provide for some educational and social benefits that are not available in segregated schools. From the experience of Los Angeles and many other school districts, it is clear that white flight can nullify the first justification.

The second major justification for mandatory busing plans is to eliminate the _effects_ of past discrimination and isolation, and to provide equality of educational opportunity for minority students. According to the courts, equality of opportunity can only be accomplished by providing a desegregated education. The predominant view here, from the Brown decision to the present day, is that segregated schools were harmful for black students by perpetuating prejudice and by leading to a poor self-concept and lower academic performance. Desegregation and school busing were intended not only to remedy racial isolation itself, but to remedy the effects of isolation by improving race relations and improving the educational performance of minority students.

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[4] James Coleman, Thomas Hoffer, and Sally Kilgore, _High School and Beyond: Public and Private Schools_, The National Opinion Research Center, Chicago, Illinois, March 1981.

There is no question that minority groups have suffered from prejudice and discrimination, and that the academic performance of minority students frequently falls behind that of white students. We need programs to combat these problems. But there is an abundance of evidence, now, that desegregation per se does not improve race relations or the academic performance of minority students. Several recent studies summarize this evidence.

A doctoral dissertation by Ronald Krol reviewed 129 studies of the effects of desegregation on minority student achievement [5]. This study is distinguished from several other recent reviews of desegregation and achievement by estimating the size of the desegregation effect.[6] Dr. Krol found that, for those studies having a segregated comparison group, the net achievement gain of desegregated minority students was small and not statistically significant.[7]

An illustration of this lack of effect is shown in Pasadena, California, one of the first cities to experience massive court-ordered busing. A special study done in 1974 showed that, after four years of desegregation, the difference in achievement between minority students and white students (and the national norms) remained relatively constant. Both minority and white students showed normal increases in learning, but desegregation did not close the gap. (See Figure 3)

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[5] Ronald A. Krol, "A Meta Analysis of the Effects of Desegregation on Academic Achievement", The Urban Review, Vol. 12, No. 4, 1980.

[6] Another recent review claimed a positive affect of desegregation on achievement, but the size of the effect was not estimated. Robert Crain and Rita Mahard, "Desegregation and Black Achievement: A Review of the Evidence" Law and Contemporary Problems, 42 (1980).

[7] Dr. Krol reported a larger achievement gain for desegregated students in studies without a comparison group, but there was no way to estimate how much of this gain would have occurred had the students been in segregated schools (minority students show some gain from one year to another in any school environment)

School busing is also supposed to remedy the effects of segregation by increasing positive racial contact, reducing prejudice, and improving race relations in general. Again, there is no consistent evidence that this has happened in desegregation programs.

One of the more comprehensive reviews of desegregation and race relations was conducted by Professor Nancy St. John in 1975.[8] She found that the effect of desegregation on several race relations measures were mixed, with some studies showing positive effects, some showing negative effects, and some showing no effect at all. When the studies were restricted to those with more rigorous research designs, a majority of the studies actually showed negative effects of desegregation on race relations.

Some of the reasons why school desegregation might have harmful effects on race relations is shown in an important new study of the Indianapolis schools by Professor Martin Patchen.[9] He found that white high school students experienced more unfriendly actions from black students than vice versa, although a majority of students of both races described relations as "fairly" or "very" friendly. For example, during one semester 58 percent of white students reported attempts by black students to extort money; 55 percent report being blocked in the hallway by black students; and 51 percent experienced threats of harm by black students. The same percentages for black students, reporting unfriendly actions from white students, are 11 percent, 26 percent, and 16 percent, respectively.

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[8] Nancy St. John, School Desegregation: Outcomes for Children, New York, C. Wiley & Sons, 1975.

[9] Martin Patchen, Black-White Contact in Schools: Its Social and Academic Effects, West Lafayette, Inc., Purdue University Press, 1981 (in press). Professor Patchen does not take a position for or against mandatory busing in this study.

Professor Patchen notes that these acts of aggression were not necessarily racial in purpose; black students tended to report more aggression towards both black and white students. For example, 34 percent of the black students reported hitting a white student first, but 33 percent of the black students also reported hitting a black student first. The comparable figures for white students are 18 percent (hitting a black student first) and 22 percent (hitting a white student first). Thus both races tend to be as aggressive with their own race as with the other race, but the level of aggression is higher for black students than for white students.

These findings do not mean that desegregation in general is harmful to race relations; there are many settings and circumstances in which racial contact is beneficial. They do underscore the fact that we do not fully understand the dynamics of racial contact and conflict, and that the way desegregation is being implemented in schools today may well produce more damage than benefit.

Finally, we must address the equitability of mandatory busing, which raises the relationship between the scope of the segregative violation and the extent of the remedy. In many respects the Supreme

Court's original failure to adopt conventional methods of assigning students to schools--such as a neighborhood school policy--was the critical turning point in the erroneous path to mandatory busing.

In the South, where state-mandated dual schools existed, the Supreme Court recognized that school violations might have contributed to housing segregation, and that a neighborhood school policy might then build upon this presumed segregative effect. Accordingly, the Court was unwilling to give blanket approval to a neighborhood school policy that allowed preexisting black and white schools to remain segregated. Moreover, voluntary transfer plans proved capable of desegregating white schools but not black schools. Therefore, mandatory busing eventually came to be viewed as the only way to desegregate black schools. Of course, in many cities white flight has proven this view wrong, but the extent of white flight was not anticipated when mandatory busing was first proposed.

Some social scientists dispute the courts' view that housing segregation has been influenced significantly by school segregation, and challenge the legal thesis that, but for school segregation, housing segregation would be nonexistent or considerably reduced.[10] The most compelling evidence that housing segregation does not depend on the dual school system comes from many northern and western cities, where housing segregation exists without a history of state-mandated school segregation. Without the legal thesis connecting school and housing segregation, the courts have little justification for disapproving a neighborhood school policy.

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[10] The most comprehensive critique of this thesis appears in a new book by Professor Eleanor Wolf, Trial and Error, Detroit, Wayne State university Press, 1981.

In northern desegregation cases where state-mandated segregation does not exist, the mismatch between remedy and violation becomes even more extreme. In cases like Denver, Omaha, Milwaukee, or Los Angeles, the courts claim that constitutional violations arise from such policies as voluntary transfers, building schools in expanding neighborhoods that were predominately white or black, gerrymandering attendance boundaries, allowing optimal attendance zones, and so forth. Some of these policies do have significant segregative effects; some do not. But there is no basis whatsoever for assuming that these specific violations are responsible for the extensive housing segregation that exists in these districts. The courts rarely design a remedy that merely corrects those specific violations shown to have segregative effect. Rather, the courts adopt district-wide mandatory busing, on the implausible grounds that these specific violations might have had a segregative effect elsewhere in the district or on housing choices. Again, the neighborhood school policy is abandoned in these cases, and a remedy is imposed that produces far greater desegregation than if only the known violations were remedied.

In citing these studies, I do not mean to imply that social scientists are in agreement about the lack of educational and social benefits from desegregation, the possible harmful effects of desegregation on race relations, or the causes of housing segregation. These issues are controversial and are still being debated, although the number of scientists critical of mandatory busing is growing. The heat of that controversy is best illustrated by a recent report from the

National Academy of Education, which brought together the views of 18 distinguished experts, including some critical of mandatory busing [11]. According to a New York Times story, the fact that a number of the panelists opposed mandatory busing delayed its publication and prevented wide distribution by the U. S. Department of Health, Education, and Welfare [12].

What I am saying is that studies like the ones cited here raise more than a reasonable doubt that mandatory busing is an effective remedy for the past harms of school segregation. In my own opinion, the evidence overwhelmingly supports the conclusion that mandatory busing fails as a feasible and equitable policy.

REMEDIES FOR SEGREGATION

My criticism of mandatory busing does not mean that government agencies should abandon desegregation programs, or that parents and children should not participate in them. The basic values of America demand that we work for an integrated society. But those same values determine the legitimate methods for ending segregation. In the absence of evidence that mandatory busing works, it is neither just nor equitable for courts to impose it on those citizens, minority or white, who oppose it. A court-imposed remedy is stripped of its legitimacy when the facts show that it is not a remedy after all. What we have, instead, is improper social reform by the courts, imposing their own view of how the schools should be run.

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[11] "Prejudice and Pride: The Brown Decision after Twenty-five Years," National Academy of Education, U.S. Department of HEW, 1979.

[12] Gene I. Maeroff, "Delay by HEW in Issuing Report on Desegregation is Questioned," New York Times, May 23, 1979.

I am sure that many of the facts and ideas I have discussed so far are not entirely new to the Committee. The difficult issue for Congress may not be deciding that school busing has failed, but rather finding a way to change the policy. While a constitutional amendment is one obvious suggestion, it might not be the easiest or quickest way to resolve the issue. Because busing cases occur at different times in different states, it might be hard to find a single time when three-fourths of the state legislatures feel sufficiently motivated to approve an amendment.

Obviously, the simplest solution would be for the Supreme Court to change the policy. There are several Justices (cited above) who want a complete review of the policy. But the Court's recent decisions on Columbus and Dayton suggest that the majority is not ready to abandon mandatory busing. Like your colleague, Senator Moynihan, I believe that the Supreme Court will eventually correct its mistake. [13] But if it takes the Court as long to correct this mistake as it did to correct its separate-but-equal policy, nearly 60 years, our public schools may never recover.

There are many legal scholars who claim the courts became involved in school segregation remedies only after legislative bodies had failed to act. If so, perhaps it is time once again for Congress to act, and to insist that Congress, not the courts, should design feasible remedies to be used for Constitutional violations by schools. What we need is a division of power now recognized in other branches of law, where legislatures set the types and ranges of penalties for various infractions, and the courts decide whether an infraction has occurred and select the specific penalty to be imposed.

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[13] Daniel Patrick Moynihan, "What Do You Do When the Supreme Court is Wrong," The Public Interest, No. 57, Fall, 1979.

The Congress has passed 14th amendment legislation before, such as the Equal Educational Opportunities Act of 1974, but it has not been effective. The reason is that this type of legislation does not confront the division of power issue directly, and in fact usually contains sections allowing the courts to ignore the legislation when enforcing the 14th amendment. There are several strategies that might improve upon these past efforts.[14]

First, the Congress might commission studies to consolidate evidence showing the feasibility of various types of remedies for school segregation. This evidence can serve as findings of fact to support new legislation.

Second, new legislation should represent an affirmative step to acknowledge the existence of constitutional violations and to address the need for feasible remedies, rather than legislation that simply opposes mandatory busing. Such remedies as voluntary transfers, neighborhood school policies, special magnet schools, and compensatory programs might be listed as acceptable remedies; mandatory busing to non-neighborhood schools could be prohibited. The legislation should tailor the remedy to fit actual violations; existence of violations affecting some schools should not be used as a "trigger" to impose a district-wide desegregation plan.

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[14] Some of these ideas were influenced by discussions with Donald Lincoln, of Jennings, Engstrand, and Henrikson, San Diego; and Professor Mark Yudof, University of Texas Law School, Austin; but the author accepts full responsibility for them.

Third, and most important, rather than exempting courts from using the Congressional remedy law, new legislation should require the court to use remedies approved by Congress. Although I am not an attorney, some constitutional experts argue that Congress can regulate the appelate jurisdiction of the federal courts under Article III, Section 2 of the Constitution. Such authority might be the basis for legislation allowing the courts to decide the existance of school violations and to select appropriate remedies, but also limiting the courts to those remedies approved by Congress.

There are likely to be arguments over whether Congress currently has authority to regulate remedies for 14th amendment violations. But these arguments will miss the essential point. At its foundation, the busing crisis amounts to excessive intervention by the courts to eliminate the neighborhood school policy. If the Congress devises a fair and reasonable division of powers for enforcing the 14th amendment, and the Supreme Court declares the law unconstitutional, then Congress has a very strong case to take to the public. If it comes to that point, there may well be sufficient popular support for a constitutional amendment to guarantee a reasonable division of powers for 14th amendment violations, and to guarantee an end to mandatory busing.

Thank you for your attention.

Table 1

RACIAL COMPOSITION OF MINORITY SCHOOLS
IN THE LOS ANGELES BUSING PLAN, FALL 1980[a]

Percent White	Number of Schools, Based on: Resident Enrollment Before Busing	Number of Schools, Based on: Actual Enrollment After Busing
0 - 19%	35	14
20 - 29%	12	12
30 - 39%	2	14
40+ %	0	9

[a] Data supplied by the Los Angeles school district.

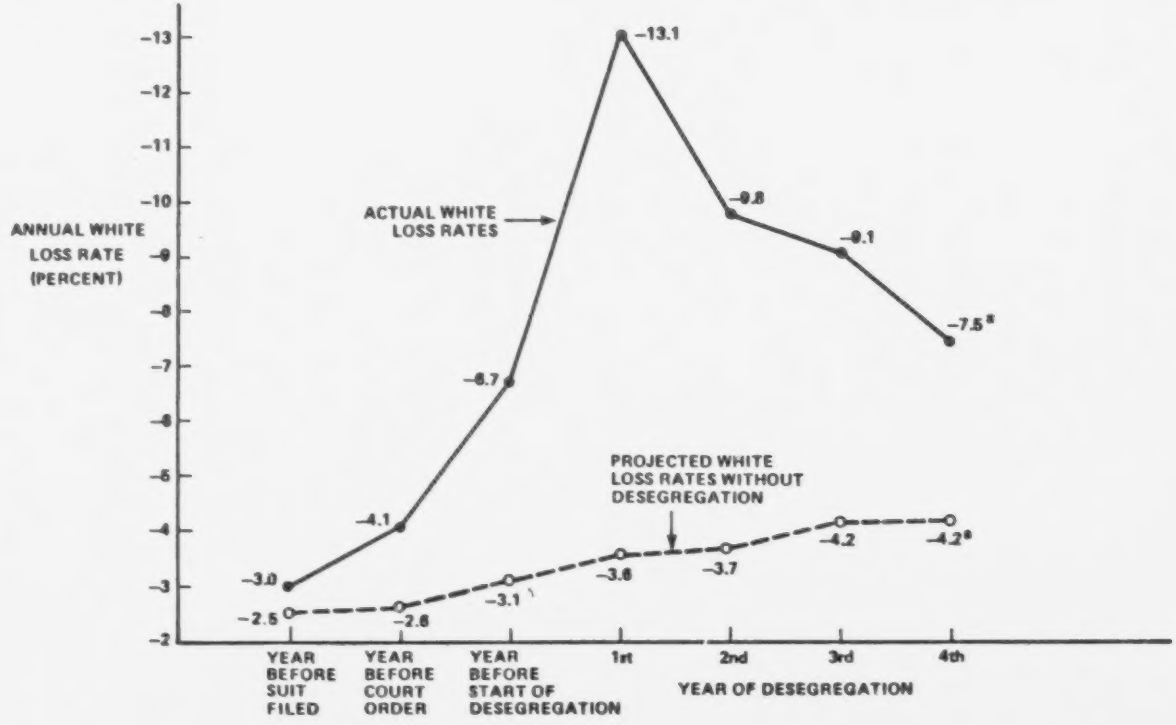
Figure 1

WHITE LOSS RATES DUE TO MANDATORY BUSING PROGRAMS IN SELECTED CITIES

Taken from David J. Armor, "White Flight and the Future of School Desegregation", in Stephan and Feagin, *School Desegregation*, New York, Plenum, 1980. Cities are those with at least 20 percent minority in 1968, suburban development outside the district, and that began busing by 1975.

Figure 1a

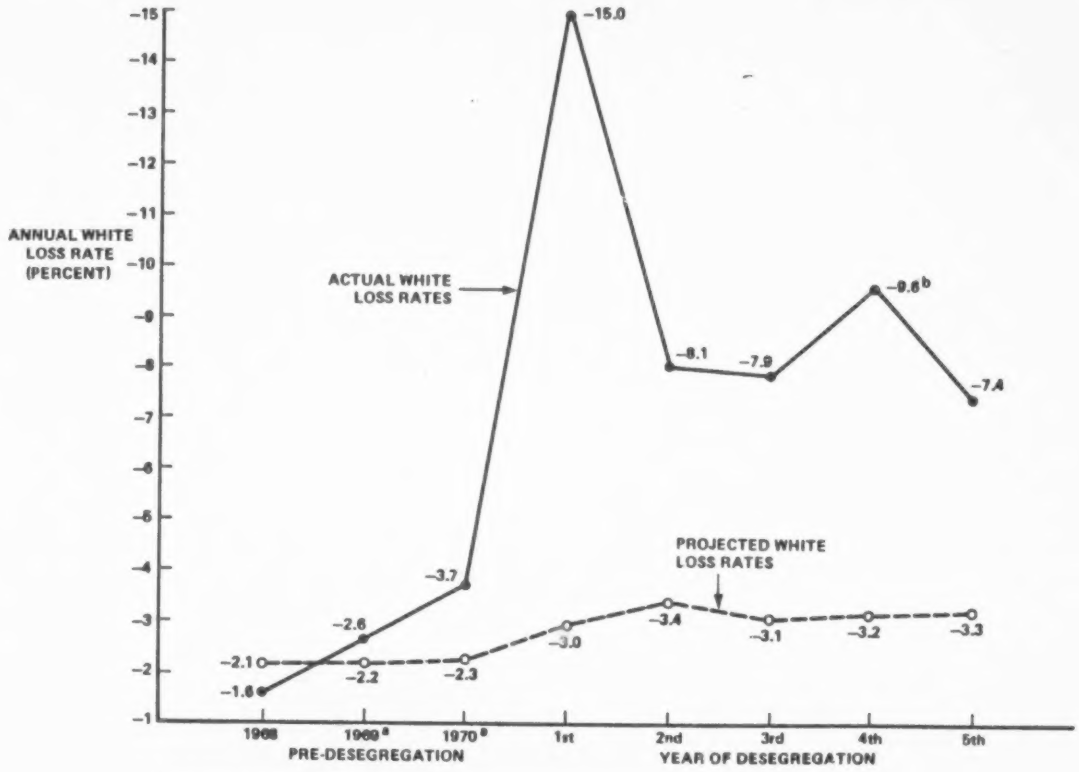
ACTUAL AND PROJECTED WHITE LOSS RATES FOR NORTHERN SCHOOL DISTRICTS WITH COURT-ORDERED MANADTORY DESEGREGATION



[a] EXCLUDES DETROIT

Figure 1b

ACTUAL AND PROJECTED WHITE LOSS RATES FOR SOUTHERN SCHOOL DISTRICTS WITH COURT-ORDERED MANDATORY DESEGREGATION



[a] 1967 AND 1968 FOR OKLAHOMA CITY, WHICH STARTED DESEGREGATION IN 1969 AND 1971 AND 1972 FOR MEMPHIS, WHICH STARTED IN 1973.

[b] MAJOR DESEGREGATION ACTIONS IN OKLAHOMA CITY, BIRMINGHAM, AND ATLANTA.

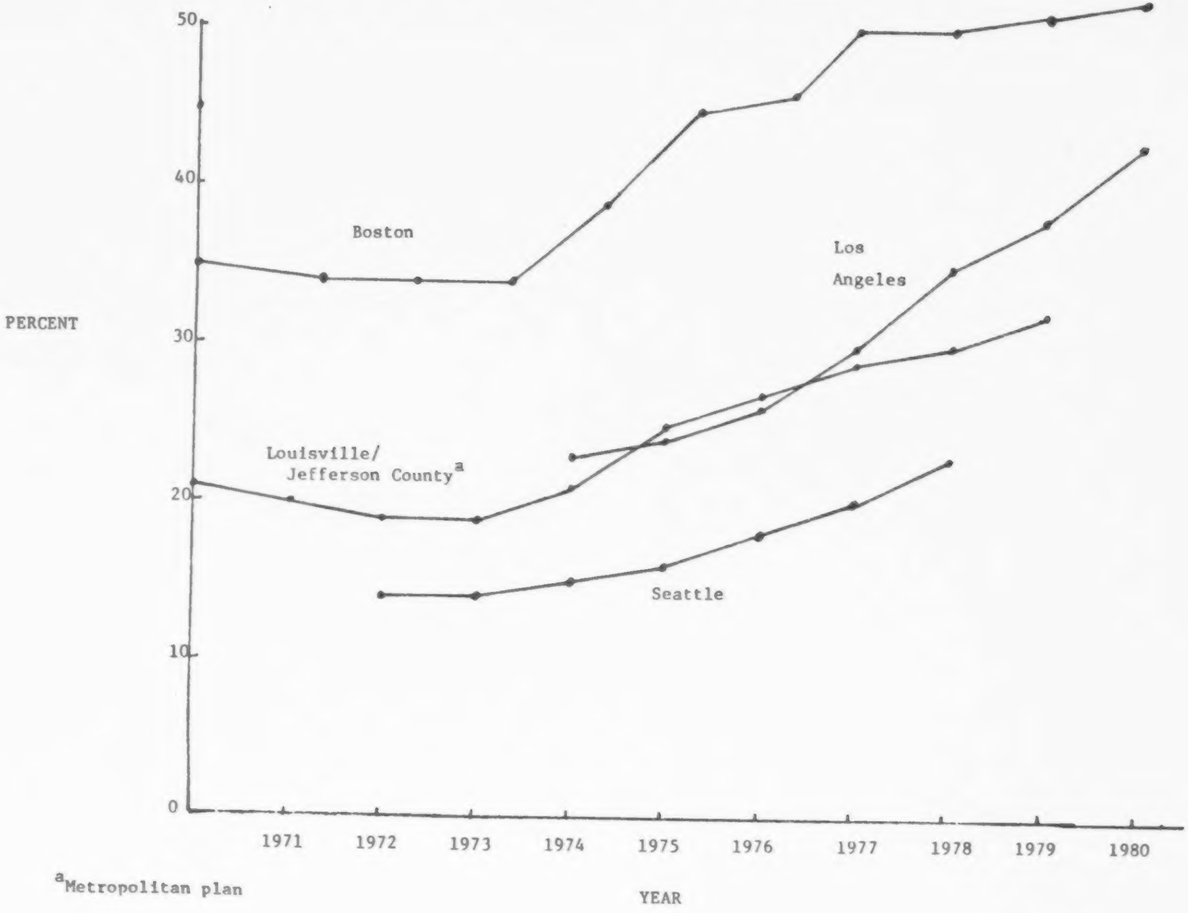
Figure 2

PERCENT OF WHITE
STUDENTS IN PRIVATE SCHOOLS
IN SELECTED CITIES WITH
MANDATORY BUSING

Note: Mandatory busing began in 1978 in Los Angeles and Seattle; 1975 in Louisville-Jefferson County; and 1974 in Boston.

Figure 2

PERCENT OF ALL WHITE STUDENTS IN PRIVATE SCHOOLS



[a] Metropolitan plan

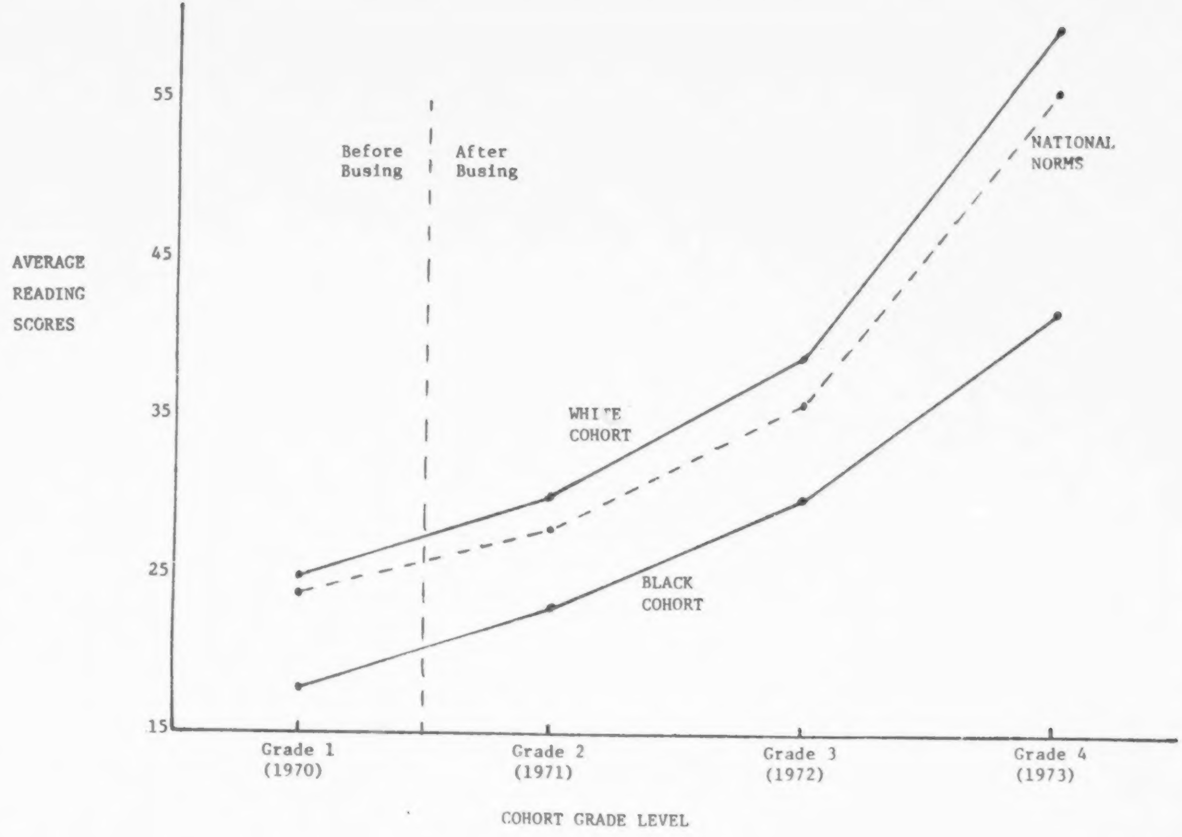
Figure 3

READING ACHIEVEMENT CHANGES
IN PASADENA AFTER BUSING:
FIRST GRADE COHORT

Note: Grades 1 to 3 were tested with the Cooperative Primary Test; Grade 4 was tested with the CTBS.

Figure 3

PASADENA READING ACHIEVEMENT CHANGES AFTER BUSING



RESEARCH REPORT

The Evidence on Busing

DAVID J. ARMOR

The legal basis of the national policy of integration—and of the school busing issue today—is the declaration of the Supreme Court in 1954 that

> to separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

Few decisions of the Court have provoked so much controversy for so long, or have had so much impact on the way of life of so many persons, as the case of *Brown v. the Board of Education of Topeka,* where this doctrine is stated. Policy makers have used it to restructure political, economic, and social institutions. Groups have rioted and states

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Rarely can an unpublished academic article have attracted as much attention and publicity as has this analysis of busing. Professor Armor, a sociologist who specializes in research methods and social statistics, played a leading role in research on the Boston METCO study, which was one of the earliest evaluations of the effects of busing on black students. In this article he reports the detailed findings of that study plus those of several other comparable studies. While his manuscript was being copy-edited in our office, its findings were being "reported" in the national press (e.g., New York Times, Washington Post, Boston Globe), *and they have even been denounced publicly by critics who have never seen the results of the studies themselves. We are publishing the full text of this academic article —all the graphs, footnotes, and references are included at the end —because we think that, in so controversial a matter as busing, it is important to be as precise as possible, even at the risk of pedantry. Inevitably, findings such as those of Professor Armor give rise not only to public but also to scholarly controversy. In our next issue we shall print comments on Professor Armor's article by other scholars. —Editors* have divided over actions, direct and indirect, that have flowed from this ruling. And social scientists have proudly let it stand as a premier axiom of their field—one of the few examples of a social theory that found its way into formal law.

Few persons, perhaps, know of the role played by the social sciences in helping to sustain the forces behind desegregation. It would be an exaggeration to say they are responsible for the busing dilemmas facing so many communities today, yet without the legitimacy provided by the hundreds of sociological and psychological studies it would be hard to imagine how the changes we are witnessing could have happened so quickly. At every step—from the 1954 Supreme Court ruling, to the Civil Rights Act of 1964, to the federal busing orders of 1970—social science research findings have been inextricably interwoven with policy decisions.

And yet, the relation between social science and public policy contains a paradox in that the conditions for adequate research are often *not* met until a policy is in effect, while the policy itself often cannot be justified until supported by the findings of science. In consequence, the desire of scientists to affect society and the desire of policy makers to be supported by science often lead to a relation between the two that may be more political than scientific. Further, this can mean that the later evaluation research of a social action program may undo the very premises on which the action is based—as is the case somewhat in the Coleman Report on the effect of schools on achievement. There are obvious dangers for both social science and public policy in this paradox. There is the danger that important and significant programs —which may be desirable on moral grounds—may be halted when scientific support is lacking or reveals unexpected consequences; conversely, there is the danger that important research may be stopped when the desired results are not forthcoming. The current controversy over the busing of schoolchildren to promote integration affords a prime example of this situation.

The policy model behind the Supreme Court's 1954 reasoning—and behind the beliefs of the liberal public today—was based in part on social science research. But that research did not derive from the conditions of induced racial integration as it is being carried out today. These earlier research designs were "ex post facto"—i.e., comparisons were made between persons already integrated and individuals in segregated environments. Since the integration experience occurred *before* the studies, any inferences about the effects of *induced* integration, based on such evidence, have been speculative at best. With the development of a variety of school integration programs across the country there arose the opportunity to conduct realistic tests of the integration policy model that did not suffer this limitation. While it may have other shortcomings, this research suffers neither the artificial constraints of the laboratory nor the causal ambiguity of the cross-sectional survey. The intent of this essay is to explore some of this new research and to interpret the findings. What we will do, first, is to sketch the evolution of the social science model which became the basis of public policy, and then review a number of tests of this model as revealed in recent social science studies of induced school integration and busing.

The Integration Policy Model: Stage I

The integration model which is behind current public policy is rooted in social science results dating back to before World War II. The connections between segregation and inequality were portrayed by John Dollard (1937) and Gunnar Myrdal (1944) in the first prestigious social science studies to show how prejudice, discrimination, segregation, and inequality operated to keep the black man in a subordinate status. Myrdal summarized this process in his famous "vicious circle" postulate: White prejudice, in the form of beliefs about the inferior status of the black race, leads to discrimination and segregation in work, housing, and social relationships; discrimination reinforces social and economic inequality; the resulting inferiority circles back to solidify the white prejudice that started it all. The vicious circle theory was the integration policy model in embryonic form.

Along with these broad sociological studies there also appeared a number of psychological experiments which were to play a crucial role in the policy decisions. The most notable were the doll studies of Kenneth and Mamie Clark (1947). They found that preschool black children were much less likely than white children to prefer dolls of their own race. Though this tendency tapered off among older children, the Clarks concluded that racial awareness and identification occurred at an early age and that the doll choices suggested harmful and lasting effects on black self-esteem and performance. Other studies confirmed these early findings (Proshansky and Newton, 1968; Porter, 1971). These studies added a psychological dynamic to explain the operation of the vicious circle: Prejudice and segregation lead to feelings of inferiority and an inability to succeed among the blacks; these sustain inequality and further reinforce the initial white prejudice. In other words, segregation leads to serious psychological damage to the black child; that damage is sufficient to inhibit the kind of adult behavior which might enable the black man to break the circle.

How could the circle be broken? This question plagued a generation of social scientists in quest of a solution to America's race problems. Of a number of studies appearing after the war, two which focussed upon the effects of segregation and integration upon white racial attitudes had especial impact. The first was a section of Samuel Stouffer's massive research on the American soldier during World War II (1949). Stouffer found that white soldiers in combat companies with a black platoon were far more likely to accept the idea of fighting side by side with black soldiers than were white soldiers in non-integrated companies. The second was the study by Morton Deutsch and Mary Evans Collins (1951) of interracial housing. Comparing residents of similar backgrounds in segregated and integrated public housing projects, they found that whites in integrated housing were and to have positive attitudes towards blacks in general than were whites living in the segregated projects. Though neither of these studies could ascertain the beliefs of these individuals *prior* to integration, neither author had reason to believe that the integrated whites differed from the segregated whites before the former's experience with blacks. They concluded, therefore, that the positive results were due to the effect of interracial *contact* and not to prior positive belief.

The culmination of this research was Gordon Allport's influential work, *The Nature of Prejudice* (1953). Using the work of Stouffer, Deutsch and Collins, and others, he formulated what has come to be known as the "contact theory":

> Contacts that bring knowledge and acquaintance are likely to engender sounder beliefs about minority groups. . . . Prejudice . . . may be reduced by equal status contact between majority and minority groups in the pursuit of common goals. The effect is greatly enhanced if this contact is sanctioned by institutional supports (i.e., by law, custom, or local atmosphere), and if it is of a sort that leads to the perception of common interests and common humanity between members of the two groups.

The clear key to breaking the vicious circle, then, was contact. By establishing integrated environments for black and white, white prejudice would be reduced, discrimination would decline, and damaging effects upon the black child's feelings and behavior would be reduced.

While the Supreme Court based its 1954 decision upon the narrower relationship between legally sanctioned segregation and psychological harm, it is clear that the *modus operandi* by which the damage would stop is implied by the contact theory. With the 1954 decision, then, contact theory became an officially sanctioned policy model, and the Southern public school systems became prime targets for its implementation.

The Integration Policy Model: Stage II

In the eyes of the Northerner, segregation had always been a Southern problem. The Supreme Court's action at first reinforced this belief, since state-sanctioned school segregation was rare outside the South. But events in the 1960's changed this for good. While the modern civil rights movement began in the South, its zenith was reached in the March on Washington in the late summer of 1963. Organized to dramatize the failure of court action to end segregation in the South, the March brought together 250,000 persons in the most impressive organized protest meeting in the history of the United States, and showed President Kennedy and the Congress the deep and massive support for anti-discrimination legislation.

The Congress answered this appeal by passing the Civil Rights Act of 1964, the strongest such act since the Reconstruction period. The Act included strong sanctions against discrimination in education, employment, housing, and voting (the last supplemented by the Voting Rights Act of 1965), and while its thrust was still aimed at the South, it also set standards that could be used against de facto segregation in the North (for example, the Title VI provisions directed the withholding of federal funds from localities which intentionally maintain segregated schools—and this has recently been applied to the city of Boston). Equally important, it set in motion a social science study that was to have an immense impact upon public policy in the North as well as the South. As part of the Act, the Congress commissioned the United States Office of Education to conduct a survey "concerning the lack of equal educational opportunities for individuals by reason of race, color, religion, or national origin in public educational institutions at all levels in the United States. . . ." Sociologist James Coleman was selected to head a team to design and conduct the survey.

The Coleman Report (1966), as it has come to be known, contained striking evidence of the extent of school segregation not only in the South but in all parts of the country. While the South was more segregated than the North, fully 72 per cent of black first graders in the urban North attended predominantly black schools. The report also confirmed one of the basic assumptions of the Stage I model: that black students performed poorly compared to white students. Using results from a variety of achievement tests, Coleman reported that throughout all regions and all grade levels, black students ranged from two to six years behind white students in reading, verbal, and mathematics performance. Equally, black students were shown to have lower aspirations, lower self-esteem about academic ability, and a more fatalistic attitude about their ability to change their situation.

The Coleman study, however, also reported some findings that surprisingly were not in accord with the early model. For one thing, black children were already nearly as far behind white children in academic performance in the *first* grade as they were in later grades. This raised some question about whether school policies alone could eliminate black/white inequalities. Adding to the significance of this finding were the facts that black and white schools could not be shown to differ markedly in facilities or services, and that whatever differences there were could not be used to explain the disparities in black and white student achievement. This led Coleman to conclude that

> schools bring little influence to bear on a child's achievement that is independent of his background and general social context; and this very lack of an independent effect means that the inequalities imposed on children by their home, neighborhood, and peer environment are carried along to become the inequalities [of their adult life].

While the findings about segregation and black/white differences have been widely publicized and largely accepted, this concluding aspect of Coleman's findings has been ignored by educational policy makers. Part of the reason may derive from the methodological controversies which surrounded these findings (e.g., Bowles and Levin, 1968), but the more likely and important reason is that the implications were devastating to the rationale of the educational establishment in its heavy investment in school rehabilitative programs for the culturally deprived; the connection between public policy and social science does have its limitations.

We must return to the policy makers one more time for an important input into the final policy model. In 1965, President Johnson requested the United States Commission on Civil Rights to conduct an investigation into the effects of de facto segregation in the nation and to make recommendations about how it might be remedied. He expressed hope that the findings "may provide a basis for action not only by the federal government but also by the states and local school boards which bear the direct responsibility for assuring quality education." The Commission recommendations, in its 1967 volume entitled *Racial Isolation in the Public Schools,* constitute the most comprehensive policy statement to date on the subject of school integration; it is the policy which is, indeed, being followed by many states and local school boards throughout the country.

Using data from the Coleman study and several other original studies prepared for the Commission, the report concluded that

> Negro children suffer serious harm when their education takes place in public schools which are racially segregated, whatever the source of such segregation may be. Negro children who attend predominantly Negro schools do not achieve as well as other children, Negro and white. Their aspirations are more restricted than those of other children and they do not have as much confidence that they can influence their own futures. When they become adults, they are less likely to participate in the mainstream of American society, and more likely to fear, dislike, and avoid white Americans. The conclusions drawn by the U.S. Supreme Court about the impact upon children of segregation compelled by law—that it "affects their hearts and minds in ways unlikely ever to be undone"—applies to segregation not compelled by law.

To remedy this situation, the Commission recommended that the federal government establish a uniform standard for racial balance and provide financial assistance to states that develop programs to meet the standard. The Commission did not recommend a precise standard, but it did suggest that the standard be no higher than 50 per cent black in any single school. Likewise, the Commission did not specifically recommend that busing be the method whereby integration is accomplished. But the realities of residential segregation in many cities throughout the nation offered little alternative to the use of busing if these integration standards were to be attained.

This, then, became the basis for the integration policy model as applied to public schools. While the implementation of racial balance programs has differed from one locality to the next, the underlying rationale of all these programs is similar to that first formulated by the Supreme Court and extended by the Civil Rights Commission. The full policy model may be summarized as follows: The starting point is white prejudice consisting of stereotyped beliefs about black people These beliefs lead to discriminatory behavior in employment, housing, schooling, and social relationships in general. Discrimination in turn leads to social and economic inequality on the one hand, and segregation on the other hand. Inequality and segregation are mutually reinforcing conditions, reflecting not only the judicial doctrine that separation is inherently unequal, but also the social reality that segregation of a deprived group can cut off channels and networks that might be used to gain equality. Segregation and inequality combine to cause psychological damage in children resulting in lower achievement, lower aspirations, and less self-esteem. As the child grows older, this damage leads, on the one hand, to further social and economic inequalities in the form of inadequate education and inferior jobs and, on the other hand, to black alienation, prejudice, and hostility towards whites. This in turn leads to increased white prejudice (the vicious circle) and a general polarization of race relations. Given these cause and effect relations, the elimination of segregation in schooling should act as a countervailing force for black students by increasing achievement, raising aspirations, enhancing self-esteem, reducing black/white prejudices and hostility, and enabling black students to find better educational and occupational opportunities. It then follows that social and economic inequalities would be lessened and the vicious circle would be bent if not broken.

It must be stressed that this model is construed from public policy. While many of the causal relationships assumed in the model are, indeed, based on many years of scientific research in psychology and sociology, it is doubtful that any two specialists in the field of race relations would agree on all of the components of the model. Be that as it may, it is more to the point to stress that we are not setting out to test the *full* model. *We are specifically interested in those aspects of the model that postulate positive effects of school integration for black students; namely, that school integration enhances black achievement, aspirations, self-esteem, race relations, and opportunities for higher education.* We do not have data on the effects of integration on adults, nor on the effects of other types of integration, such as neighborhood housing, employment, and other forms. More important, the school integration programs we review here have two important characteristics in common that may limit generalizability. First, they are examples of "induced" integration as opposed to "natural" integration. Induced integration is brought about by the decision of a state or local agency to initiate a school integration program (sometimes voluntary, sometimes mandatory), rather than by the "natural" process whereby a black family makes an individual decision to relocate in a predominantly white community. Second, all of these programs have had to use varying amounts of busing to accomplish integration. This makes it difficult to separate out the potential effects of busing, if any, from the integration experience *per se*. In other words, *we will be assessing the effects of induced school integration via busing*, and not necessarily the effects of integration brought about by the voluntary actions of individual families that move to integrated neighborhoods. This is a more limited focus, is precisely the policy model that has been followed (or is being considered) in many communities throughout the country.

The Data

Many of the cities which desegregated their schools to achieve a racial balance have conducted research programs to evaluate the outcomes of desegregation. It is from these studies that we can derive data to test the school and busing hypotheses stemming from the integration policy model. Since the evaluations were conducted independently, the variables studied and the research designs differ from one study to the next, and the quality of the research and the reports varies considerably. Accordingly, we have been selective in choosing studies to include in our analysis. Our choices have been guided by two considerations: 1) A study must employ a longitudinal time-span design, with the same tests administered at different times during the integration experience so that *actual* changes can be assessed; and 2) a study must have a control group for comparison with integrated black students. The ideal control group, of course, would consist of black students who are identical to the integrated students in every way except for the integration experience. Since such studies are rare, an "adequate" control group for our present purposes is either a group of non-bused black students who are reasonably comparable to the bused black students, or a group of white students in the same school as the bused black students. In the latter case, the effects of integration are revealed in the changes in the black/white differential for the measure in question.[1]

The data we will use can be classified into two parts. The first part consists of findings from a study of Boston's METCO program, for whose research design, execution, and analysis we are partly responsible (Walberg, 1969; Armor and Genova, 1970).[2] The data are more complete and offer a more thoroughgoing test of the policy model than many other studies we have seen. The METCO program buses black students of all age levels from Boston to predominantly white middle-class schools in the suburbs. Approximately 1500 black students and 28 suburban communities have participated since the program began in 1966; the study from which our data will be taken covers the period from October 1968 to May 1970. The study used a longitudinal design that called for achievement testing for all students and a questionnaire for the junior and senior high students in three waves: the first at the beginning of the school year in October 1968; a second in May 1969; and a third in May 1970. (For a variety of reasons, the achievement testing was not done for the third wave.) The questionnaire covered several areas, including academic performance, aspirations and self-concept, relations with and attitudes toward white students, and attitudes toward the program.

The METCO study also included a small control group consisting

The fact that the siblings were from the same families as the bused students means that there is an automatic control for social class and other tangible and intangible family factors. Since the high application rate usually prevented the busing program from taking more than one applicant per family, we had reason to believe that the control students would not differ substantially from the bused students along the important dimensions of ability, aspirations, and so forth. This belief is confirmed by the findings presented in the next section.

In addition to the data for black students, there are also data from a single cross-sectional study done in the spring of 1969 to assess the impact of the program on white sophomores in eight of the suburban schools (Useem, 1971 and 1972). We will cite some of the findings from the Useem study whenever such comparisons seem relevant.

The second part of the data comes largely from reports on integration programs in four other Northern cities throughout the country.[4] In 1964, White Plains, New York, closed down one racially imbalanced inner-city elementary school and began busing the children to predominantly white inner-city schools; the study we cite covers a two-year period from 1964 to 1966 (White Plains Public Schools, 1967). In Ann Arbor, Michigan, there was a similar pattern: A racially imbalanced elementary school was closed in 1965 and the students were bused to predominantly white schools; the study covers a one-year period with a three-year follow-up (Carrigan, 1969). A program in Riverside, California, followed a graduated program of closing its racially imbalanced elementary schools and integrating its predominantly white schools; the program began in 1965 and the study covers a five-year period (Purl and Dawson, 1970; Gerard and Miller, 1971). The fourth program, Project Concern, is similar to METCO. Elementary school children from two inner cities (Hartford and New Haven, Connecticut) are bused to suburban schools in surrounding towns; this program began in 1966—the studies selected cover two years for Hartford (Mahan, 1968) and one year for New Haven (Clinton, 1969). In addition to these five major studies, we will also refer at certain points to studies of other integration programs that seem relevant. One such study is an evaluation of A Better Chance (ABC), a program which places high-ability black students in white preparatory schools in the Northeast (Perry, 1972). This evaluation research used techniques and instruments similar to those used in the METCO study; therefore comparisons with ABC may be more valid than comparisons with some of the other studies.

To test the integration policy model we can group our findings under five major headings—the effects of busing and integration on: (1) academic achievement; (2) aspirations; (3) self-concept; (4) race relations; and (5) educational opportunities. In addition, we will examine a sixth area, program support. In each case, we shall compare bused students with the control groups to assess those changes that might be uniquely associated with the effects of induced integration.

The Findings: Achievement

None of the studies were able to demonstrate conclusively that integration has had an effect on academic achievement as measured by standardized tests. Given the results of the Coleman study and other evaluations of remedial programs (e.g., Head Start), many experts may not be surprised at this finding. To date there is no published report of *any* strictly educational reform which has been proven substantially to affect academic achievement; school integration programs are no exception.

The changes in reading achievement for elementary and secondary students in the METCO program are shown in Figures 1 and 2.[5] For the elementary students, the grade-equivalent gains for bused third and fourth graders after one year are somewhat greater than those for the control group (.4 to .3), but this is not a statistically significant difference. For grades 5 and 6 the situation is reversed; the control group outgained the bused group (.7 and .5), but again the difference is not significant. We can see that the control group is somewhat higher initially for both grade levels, but this difference, too, is not significant.[6]

In the case of high school students, the bused group scores somewhat higher than the control groups initially (but not significantly so).[7] Nonetheless, the gain scores present no particular pattern. While the bused junior high students increased their grade-equivalent score from 7.5 to 7.7, the control group improved from 7.4 to 7.5; the bused gain is not significantly different from that for the control group. For senior high students the effect is reversed; the control students gain more than the bused students (9 percentile points compared to 4 points), but again the gains are not statistically significant for either group.

The results for reading achievement are substantially repeated in a test of arithmetic skills; the bused students showed no significant gains in arithmetic skills compared to the control group, and there were no particular patterns in evidence.

The White Plains, Ann Arbor, and Riverside studies also found no significant changes in achievement level for bused students in the elementary grades when comparisons were made with control groups. Although the White Plains report did show some achievement gains among the bused students, these were not significantly different, statistically, from gain scores of inner-city black students in 1960. Moreover, when comparisons were made with white students in the integrated schools, the black/white achievement gap did not diminish during the period of the study. The Ann Arbor study compared bused black student gains to white gains and to black student gains in a half-black school.[8] The bused students did not gain significantly more than the black control group, nor did their gains diminish the black/white gap in the integrated schools. On the contrary, a follow-up done three years later showed that the integrated black students were even further behind the white students than before the integration project began.[9] The Riverside study compared minority students (black and Mexican-American) who had been integrated for differing number of years with the city-wide mean (which consisted of about 85 per cent white students). The minority/white gap had not diminished for fourth graders who had been integrated since kindergarten; the gap in 1970 was as great as it was in 1965 when the program began (Purl and Dawson, 1971). Similar results occurred for minority pupils at other grade levels with differing numbers of years in the integration program.

Studies in the fifth program, Project Concern, showed mixed results. A study of the Hartford students compared bused black students who received special supportive assistance with non-bused inner-city black students (Mahan, 1968). (Although two separate one-year periods were covered, problems with missing data allow valid comparisons for only one full academic year, fall 1967 to spring 1968). The bused students showed significant IQ gains only in grades two and three; the gains in kindergarten and grades one, four, and five were either insignificant or, in two cases, favored the control group. In a study of New Haven students, second and third grade students were randomly assigned to bused and non-bused conditions and were given reading, language, and arithmetic tests in October 1967 (when the busing began) and again in April 1968 (Clinton, 1969). Of the six comparisons possible (three tests and two grades), only two showed significant differences favoring the bused students.[10]

While none of these studies are flawless, their consistency is striking. Moreover, their results are not so different from the results of the massive cross-sectional studies. An extensive reanalysis of the Coleman data showed that even without controlling for social class factors, "naturally" integrated (i.e., non-bused) black sixth-grade groups were still one and one-half standard deviations behind white groups in the same schools, compared to a national gap of two standard deviations (Armor, 1972). This means that, assuming the Coleman data to be correct, the *best* that integration could do would be to move the average black group from the 2nd percentile to the 7th percentile (on the *white* scale, where the average white group is at the 50th percentile). But the social class differences of integrated black students in the Coleman study could easily explain a good deal of even this small gain. Other investigators, after examining a number of studies, have come to similar conclusions (St. John, 1970).

While there are no important gains for the METCO group in standardized test scores, there were some important differences in school grades (See Fig. 3). Even though the bused secondary school students have somewhat higher test scores than the control group, the bused group was about half a grade-point *behind* the control group in 1969, and the bused students dropped even further behind by 1970.[11] The average control student is able to maintain a grade average at above a B— level in the central city, while the average bused student in the suburbs is just above a C average. Although it is not shown in the Figure, from the Coleman study [illegible] average white student *academic* grade average (i.e., excluding non-academic courses—an exclusion not made for the black students) at about 2.45, or between a B— and C+ average.

Again, if we take into account the Coleman findings, we should not be too surprised. Since black students of the same age are, on average, behind white students in all parts of the country with respect to academic achievement, we should expect their grades to fall when they are taken from the competition in an all-black school to the competition in a predominantly white school. In addition, the bused students may not be adequately prepared for this competition, at least in terms of the higher standards that may be applied in the suburban schools.

Aspiration and Self-concept

In the METCO study we found that there were no increases in educational or occupational aspiration levels for bused students (see Figs. 4 and 5); on the contrary, there was a significant decline for the bused students, from 74 per cent wanting a college degree in 1968 to 60 per cent by May 1970. The control panel actually increased its college aspirations over the same period, but this is probably not a meaningful finding. (The cross-sectional data show a slight decline for the control group in 1970; this cautions us about our interpretation).

At the very least, we can conclude that the bused students do not improve their aspirations for college. The same is true for occupational aspirations, and in this case both the bused students and the controls show a similar pattern. We should point out, however, that the initial aspiration levels are already very high; Coleman found that only 54 per cent of white twelfth graders in the urban North aspired to college, and 53 per cent expected a professional or technical occupation. Therefore, even the slight decline we have found still leaves the bused students with relatively high aspirations compared to a regional norm. Moreover, when achievement is taken into account, black students actually have higher aspirations than white students at similar levels of achievement (Armor, 1967; Wilson, 1967). In this respect, some educators have hypothesized that integration has a *positive* effect in lowering aspirations to more realistic levels; of course, others would argue that any lowering of aspirations is undesirable. However, we shall see in a later section that the METCO students were more likely to start college than the control group.

Since the other cities in our review included only elementary students, they do not provide data on regular educational or occupational aspirations.[12] But two of the studies did examine a concept closely related to aspirations—"motivation for achievement." The findings of the Ann Arbor and Riverside studies corroborate the pattern of high aspirations for black children in both the pre- and post-integration periods. In addition, the Ann Arbor researchers concluded that the overly high aspiration of black boys may have been lowered by the integration experience. The Riverside study, on the other hand, concluded that there were no significant changes in achievement motivation.

In the METCO study we also found some important differences with respect to academic self-concept (Fig. 6). The students were asked to rate how bright they were in comparison to their classmates. While there were some changes in both the bused and control groups, the important differences are the gaps between the bused students and controls at each time period. The smallest difference is 15 percentage points in 1970 (11 points for the full cross-section), with the control students having the higher academic self-concept. Again, this finding makes sense if we recall that the academic performance of the bused students falls considerably when they move from the black community to the white suburbs. In rating their intellectual ability, the bused students may simply be reflecting the harder competition in suburban schools.

Both the Ann Arbor and Riverside studies made much more extensive inquiry into the realm of self-esteem of black children, although there were no directly comparable data for our academic self-concept measure. The Riverside study did report that, in a special test, minority children (black and Mexican-American) tended to choose white students more often than black students as "the [ones] with good grades." While we will not go into detail on the many other measures used in these studies, we can summarize their findings briefly as follows: 1) Minority children do tend to have lower self-esteem before integration, particularly in the later elementary grades; and 2) integration does not seem to affect the self-esteem measures in any clearly consistent or significant way.

Race Relations

One of the central sociological hypotheses in the integration policy model is that integration should reduce racial stereotypes, increase tolerance, and generally improve race relations. Needless to say, we were quite surprised when our data failed to verify this axiom. Our surprise was increased substantially when we discovered that, in fact, the converse appears to be true. The data suggest that, under the circumstances obtaining in these studies, integration heightens racial identity and consciousness, enhances ideologies that promote racial segregation, and reduces opportunities for actual contact between the races.

There are several indicators from the METCO study that point to these conclusions. The question which speaks most directly to the 50 per cent racial balance standard suggested by the Civil Rights Commission asked: "If you could be in any school you wanted, how many students would be white?" Figure 7 reports the percentage which responded in favor of 50 per cent or fewer white students. While both the control and the bused students started out fairly close together in 1968 (47 per cent and 51 per cent, respectively), two school years later the bused students were 15 percentage points *more* in favor of attending *non-white* schools than the controls (81 per cent compared to 66 per cent), although the differential change is not statistically significant. The changes for the controls (both the panel and the full cross-sections) indicate that the black community as a whole may be changing its attitudes toward school integration, but the bused students appear to be changing at a more rapid rate. Ironically, just as white America has finally accepted the idea of school integration (Greeley and Sheatsley, 1971), blacks who begin experiencing it may want to reject it.

That these changes reflect ideological shifts is supported by Figures 8 and 9. The bused students are much more likely to support the idea of black power than the control students, going from a difference of 11 points in 1969 to 36 points in 1970. We were also able to construct a Separatist Ideology Index from responses to a series of statements about black/white relations (e.g., 1. "Most black people should live and work in black areas, and most whites should live and work in white areas." 2. "Black and white persons should not intermarry.") The scores range from 0 (anti-separatist) to 4 (pro-separatist). From 1968 to 1970 the control group barely changes, increasing from 1.4 to 1.5. The bused group, however, changed from 1.4 to 1.8—a statistically significant change of about one half a standard deviation. This is the clearest indication in our data that integration heightens black racial consciousness and solidarity.

The changes do not appear to be in ideology alone. From 1969 to 1970 the bused students reported less friendliness from whites, more free time spent with members of their own race, more incidents of prejudice, and less frequent dating with white students (Fig. 10). In other words, the longer the contact with whites, the fewer the kinds of interracial experiences that might lead to a general improvement in racial tolerance.

To what extent might these changes be a result of negative experiences with white students in the schools? We do not doubt that there has been considerable hostility shown by certain groups of white students. Nonetheless, although the evidence is not complete, what we have indicates that the white students themselves were negatively affected by the contact. Support for the busing program was generally high among white sophomores in the eight high schools studied, especially among middle-class students in the college preparatory tracks (Useem, 1972). For example, 46 per cent of all students were "very favorable" to METCO (only 11 per cent were "not favorable"); 73 per cent felt METCO should be continued; and 52 per cent agreed that there should be more METCO students (20 per cent disagreed and 27 per cent were not sure). But those students who had direct classroom contact with bused black students showed *less* support for the busing program than those without direct contact. In fact, the kind of students who were generally the most supportive —the middle-class, high-achieving students—showed the largest decline in support as a result of contact with bused black students. This finding is based on cross-sectional data and does *not* indicate a change over time, but it is suggestive of the possibility that a general polarization has occurred for both racial groups.

The data from the Ann Arbor and Riverside studies give some support to these findings, although again there were no directly comparable measures. Moreover, it is unlikely that the concept of ideology is relevant to elementary students. The Ann Arbor study included a sociometric test, whereby children could indicate how much they liked each classmate. Black students at all grade levels suffered a loss of peer status when they switched from a segregated to an integrated school, although the results were statistically significant only for second and third grade girls and fourth and fifth grade boys. That is, these black children were liked less by their new white peers than by their previously all-black peers. Also, the level of acceptance was considerably lower for black students than for white students. On the other hand, the black students tended to be more positive about their white peers after integration than they were about their black peers before integration, although the changes are not statistically significant.

The Riverside data more clearly support the conclusion that integration heightens racial identity and solidarity. Data from a test in which children rate pictures of faces portraying various ethnic and racial groups showed that fewer cross-racial choices were made after integration than before integration. For example, one rating task required that the children choose the face that they would "most like for a friend." Both black and white children tended to choose their own race to a greater extent after one year of integration than before integration (Gerard and Miller, 1971). The Riverside study also concluded that these effects were stronger with increasing age; that is, the cross-racial choices declined more in the later grades than in the earlier grades.

To avoid any misinterpretation of these findings, we should caution that the measures discussed here do not necessarily indicate increased *overt* racial hostility or conflict. This may occur to some extent in many busing programs, but our impression based on the METCO program is that overt racial incidents initiated by black or white students are infrequent. The polarization that we are describing, and that our instruments assess, is characterized by ideological solidarity and behavioral withdrawal. Our inferences pertain to a lack of racial togetherness rather than to explicit racial confrontations or violence. While it is conceivable that a connection may exist between these ideological shifts and open racial conflicts, such a connection is not established by the studies reviewed.

There are two other qualifications we must place on the interpretation of these data. First, as of 1970 the *majority* of the bused METCO students still supported general integration ideology. Only 40 per cent of the METCO students would ideally prefer schools with a majority of black students (compared to 28 per cent of the controls); 60 per cent of METCO students believe that "once you really get to know a white person, they can be as good a friend as anyone else" (compared to 78 per cent of the controls); and 58 per cent of

METCO students do not agree that "most black people should live and work in black areas, and most whites should live and work in white areas" (compared to 71 per cent of the control students).

The main point we are making is that the integration policy model predicts that integration should cause these sentiments to *increase*, while the evidence shows they actually *decrease*, leaving the bused students *more opposed* to integration than the non-bused students. Only further research can determine whether this trend will continue until the majority of bused students shifts to a general anti-integration ideology.

Second, group averages tend to obscure important differences between individual students. While we do not deny the existence of racial tension and conflict for some students, other students and families (both black and white) have had very meaningful relationships with one another, relationships made possible only through the busing program. It is very difficult, indeed, to weigh objectively the balance of benefit and harm for the group as a whole. The main point to be made is that a change in a group average does not necessarily reflect a change in every individual group member.

Long-term Educational Effects

In view of the fact that most of the short-term measures do not conclusively demonstrate positive effects of busing in the area of achievement, aspirations, self-concept, and race relations, it becomes even more important to consider possible longer-term changes that may relate to eventual socio-economic parity between blacks and whites. Since no busing program has been in operation for more than seven years or so, this area, obviously, has not been studied extensively. There are, however, some preliminary findings on long-term educational effects. Specifically, two studies have investigated the effects of integration on college attendance, and some tentative conclusions have emerged.

Seniors from the 1970 graduating class in the METCO program, as well as the seniors in the 1970 control group, formed samples for a follow-up telephone interview in the spring of 1972. Approximately two thirds of both groups were contacted, resulting in college data for 32 bused students and 16 control group students. The results of the follow-up are striking and they are summarized in Figure 11. The bused students were very much more likely to start college than the control group (84 per cent compared to 56 per cent), but by the end of the second year the bused students resembled the control group (59 per cent compared to 56 per cent). In other words, the METCO program seems to have had a dramatic effect upon the impetus for college, and many more of the bused students actually started some form of higher education. But the bused drop-out rate was also substantially higher, so that towards the end of the sophomore year the bused students were not much more likely to be enrolled full-time in college than the control group.

In spite of this higher drop-out rate, the bused students were *still* enrolled in what are generally considered higher-quality institutions. That, is, 56 per cent of the bused students were in regular four-year colleges, compared to 38 per cent for the control group. An even greater difference was found for those enrolled in full universities (which include a graduate school). The figures are 47 per cent and 12 per cent for bused and control students, respectively.

Similar findings emerged from a special college follow-up study of the ABC program (Perry, 1972). A group of ABC students were matched with a control group of high-ability black students not in the ABC program. Since ABC is a highly selective program, the matching was carried out so that the ABC and control groups had very similar family backgrounds, socio-economic status, and achievement levels. Approximately 40 matched pairs were followed until their first year of college (academic year 1971-72). All of the ABC students entered college, whereas only half of the control group did so. While it is too early to assess differential drop-out rates, it is very clear from the data that even if half of the ABC students drop out of college, the quality of colleges attended by the ABC students is considerably higher than those attended by the control group. Of the matched pairs attending college, two thirds of the ABC students attended higher-quality institutions.

Neither of these studies is large enough, of course, to draw any definite conclusions. But there does seem to be some strong evidence that middle-class suburban or prep schools have an important "channeling" effect not found in black schools. The effect is probably due to better counseling and better contacts with college recruiting officers. Whatever the reason, black students attending such schools may have doors opened for them that are closed to students attending predominantly black schools. Given the lack of positive effects in other areas, these findings may have great significance for future busing programs, and further research is urgently needed.

Program Support

Although it is not explicitly part of the integration policy model we are testing, it seems appropriate to consider the extent of the support for the busing program among the students and communities involved. As might be expected from the changes already described, there was a general decline in the enthusiasm for the METCO program over time, with the bused students showing greater changes than the controls: 80 per cent of the bused group said they were "very favorable" to the program in 1968, compared to 50 per cent by 1970. Yet we cannot infer from this alone that there is a decline in support for the program. The drop-out rate in the METCO program is almost non-existent in spite of some of the changes we have reported. The families involved in the program appear to feel that their children will get a better education in the suburbs in spite of the inconvenience and the problems. Our data indicated that the most important reason cited by the bused students for being in the busing program was to receive "a better education." Moreover, this did not change as much as many of our other indicators from 1969 to 1970; 88 per cent said this was a "very important" reason in 1969, and 81 per cent indicated the same in 1970. Very few reported that "getting out of the city" or "more contact with whites" were important reasons for being in the program.

In other words, the justification of the program in the black community has little to do with the contact-prejudice components of the policy model; instead, busing is seen in the context of enlarging educational opportunities for the black students.

We do not have much systematic data from the white receiving schools other than those cited earlier (i.e., a sample of white sophomore students was generally supportive of the program in 1969). It is our impression, however, that most of the 28 communities that receive METCO students are enthusiastic about the program, and only a few communities have turned down the opportunity to participate. The other programs reviewed receive moderate to strong support from the community and participants. In Project Concern the drop-out rate was only 10 per cent, half of which was due to the program directors' initiative in withdrawing students. After two years of urban-to-suburban busing, nine additional suburban towns chose to participate and over 1,000 additional elementary school children were bused to suburban schools. In White Plains both black and white parents expressed more positive than negative attitudes about integration, although black parents were more favorable to the program than white parents after two years of desegregation. In Ann Arbor the black parents felt more positive toward the program after one year of desegregated schooling, but the children were slightly less positive than they were prior to the integration experience. In both groups, however, support was high; only 20 per cent of each group expressed negative attitudes toward the program.

We must conclude that the busing programs we have reviewed seem to have considerable support from both the black and white communities. In most cases, black parents were highly supportive of the various busing programs. Like the students in our own study, black parents stressed quality education as the most important benefit of such programs, whereas white parents in receiving schools tended to stress the experience of coming into contact with other races. We must point out, however, that *none* of the programs reviewed involved *mandatory* busing of white students into black communities; cities facing this situation might present a very different picture of white support. Moreover, it is unlikely that many in the black community have seen the data on achievement reported here; much black support may be based upon premises regarding academic gain which our findings call into question. Whether or not black support will be affected by such findings remains to be seen.

Social Class and Other Background Factors

Most of the data we have presented so far summarize the effects of busing on all students considered as a single group. A question might be raised about whether these effects (or lack of same) are consistent for all students regardless of their background. In particular, it might be hypothesized that social class differences between black and white students can explain the changes (or lack of changes) we have reported. We shall briefly indicate the major trends for students of differing social class and other characteristics, such as sex and age level.

It is difficult to separate race and social class, since black families as a group tend to be lower than white families on most socio-economic measures. To the extent that the distinction can be made, however, no uniquely social class factors have been reported that would contradict the findings presented so far. The Riverside study selected a group of white students whose social class scores were less than or equal to the minority students; achievement test scores of the black students were still significantly lower than the low-SES white students (although the original difference was diminished somewhat; Gerard and Miller, 1971). For the METCO data, special analyses were made of the race relations changes among bused students who were children of blue-collar as compared to white-collar workers; no significant differences emerged. What small changes there were usually revealed that the black students from white-collar families changed more (in a negative direction) than those from blue-collar families.

There is also the possibility that, contrary to the assumptions behind many school integration programs, some of the predominantly white schools to which black students are sent are in fact worse than the inner-city black schools. In the METCO study there were no data to examine this issue in detail, but it is our impression that perhaps only one or two suburbs would approximate the inner-city socio-economic level. In any event, while there were some differences from one town to another in the absolute levels of the various measures, there were no important variations in the *changes* over time that appeared to be related to any socio-economic differences in the communities.

With the exception of achievement test scores, there was some sex and age differential on various measures both before and after integration; but there were no important differences in the relative *changes* in these groups due to integration. That is, in METCO we found that girls generally had a more difficult time adjusting to the program (reflected in lower program support, stronger separatist ideology, and less contact with white students). There seemed to be some important differences in cross-sex, cross-race relationships, which were better between black boys and white girls than between white boys and black girls. This situation seems to have left some black girls with resentful feelings over white girls "stealing their men." But the amount of interracial contact was small for both groups, and, more important, the *changes* in our race relations measures for bused students were about the same for both boys and girls. A similar finding emerged for age levels. Younger students were somewhat more supportive of the program and were more positive on the various race relations measures than older students, but the degree and direction of *change* were similar for all ages. This was true for the METCO secondary school data as well as the Riverside elementary school data.

In sum, while there were some over-all differences according to the sex and age levels of students in busing programs, the effects of busing on *changes* (if any) in achievement and attitudes tended to be uniform for all groups.

It seems clear from the studies of integration programs we have reviewed that four of the five major premises of the integration policy model are not supported by the data, at least over the one-to five-year periods covered by various reports. While this does not deny the possibility of longer-term effects or effects on student characteristics other than those measured, it does mean that the model is open to serious question.

The integration policy model predicted that achievement should improve as black students are moved from segregated schools to integrated schools. This prediction was based in part upon the classical works of Kenneth Clark and others which argue that, because of segregation, black students have lower regard for themselves. It was also based in part upon reanalyses of the Coleman data which showed that black students achieve less than white students, but that black students in integrated schools achieve more than black students in segregated schools. But four of the five studies we reviewed (as well as the Berkeley and Evanston data discussed in footnote 4) showed no significant gains in achievement scores; the other study had mixed results. Our own analyses of the Coleman data were consistent with these findings (see Armor, 1972).

Although there were no gains in general standardized achievement scores that we might attribute to integration, neither were there any losses for black or white students. Unfortunately, we cannot say the same about academic grades of black students. The grades of the METCO secondary students in suburban schools dropped considerably. We did not measure the bused students' grades before they entered the program, but the fact that their test scores are somewhat *higher* than the control group's offers substantial evidence that this difference does represent a change. Along with this change we observed a difference in academic self-concept that seems to indicate that the bused students are aware that they are experiencing more difficult competition in the suburbs. While we might expect this result if we believe the Coleman finding of black/white achievement differences, it does not mean there is no problem. It is possible that there are psychological consequences of this increased competition that may be harmful to black children. Being moved from an environment where they are above average to one in which they are average or below may be frustrating and discouraging. It might be one of the reasons why the bused black students have become less supportive of the program and more supportive of black separatism.

We tested this latter possibility by examining the relationship between support for the Black Panthers and academic grades in our 1970 sample from METCO (see Fig. 12). Consistent with our findings, the bused students are more favorable to the Panthers than the control group. But among the bused students we find that the METCO group which has college aspirations but which has a C average or below stands out clearly as more pro-Panther than the other groups. In other words, the increased militancy and anti-integration sentiments among the bused students may arise partly from the fact that their aspirations remain at a very high level even though their performance declines to the point where they may question their ability to compete with whites at the college level. The fact that this group is proportionally a large one (about 25 per cent of the total bused group compared to 13 per cent for the analogous control group) may be an indication of a potentially serious problem.

The integration policy model predicted that integration should raise black aspirations. Again, our studies reveal no evidence for such an effect. Unlike poor achievement, however, low aspirations do not appear to be much of a problem. The black students in our busing program seem to have aspirations as high as or higher than white students. If anything, given their academic records in high school, these aspirations may be unrealistic for some students. The emphasis on equality of educational opportunity may be pushing into college many black students whose interests and abilities do not warrant it. The fact that only half of the 1970 METCO seniors are still enrolled in four-year colleges (after over 80 per cent had started) may attest to this possibility.

The integration policy model predicted that race relations should improve as the result of interracial contact provided by integration programs. In this regard the effect of integration programs seems the opposite of that predicted. It appears that integration increases racial identity and solidarity over the short run and, at least in the case of black students, leads to increasing desires for separatism. These effects are observed for a variety of indicators: attitudes about integration and black power; attitudes towards whites; and contact with whites. The trends are clearest for older students (particularly the METCO high school students), but similar indications are present in the elementary school studies as well. This pattern holds true for whites also, insofar as their support for the integration program decreases and their own-race preferences increase as contact increases.

It is this set of findings that surprised us most. Although many recent studies have questioned the meaning of black/white differences in achievement and aspirations, to our knowledge there have been no research findings which challenged the contact theory. The idea that familiarity lessens contempt has been a major feature of liberal thought in the western world, and its applicability to racial prejudice has been supported for at least two decades of social science research. It may be true that, under certain conditions, greater contact will lead to a reduction of prejudicial feelings among racial or ethnic groups. But the induced integration of black and white students as it is being carried out in schools today does not fulfill the conditions.

In all fairness to the Allport contact theory, it must be said that he placed many qualifications upon it. One major qualification was that the contact must be made under equal-status conditions. Many behavioral scientists might assume that an integration program presumes equality of status, at least in the formal sense that all races are treated equally and have equal access to educational resources. But there is another way to look at status. Integrating black and white students does very little, in the short term, to eliminate the *socio-economic* and *academic* status differentials between black and white students that exist before integration. Therefore, we have to question whether integration programs for black and white children fulfill the equal-status conditions as long as socio-economic and academic inequalities are not eliminated. Allport warned that contact under the wrong conditions can reinforce stereotyped beliefs rather than reduce them; this may be occurring in our current integration programs. In other words, the social class differences between blacks and whites—the differences that integration programs are supposed to eliminate eventually—may heighten the sense of black identity and solidarity, leading to an increasing opposition to integration.

What Allport did not say, but what his emphasis on equal-status conditions may imply, is that contact between two groups with strong initial prejudices may increase prejudice to the extent that stereotypes are reflected by actual group differences. For black students, initial stereotypes about white students as snobbish, intellectual, and "straight" may be partially confirmed by actual experience; the same may be true for white stereotypes of black students as non-intellectual, hostile, and having different values. We might make the same observations about some of the other ethnic and religious conflicts we see in the world today, particularly the Protestant-Catholic conflict in Northern Ireland and the Israeli-Arab battles in the Middle East. It is certainly true in these cases that the amount of contact has not lessened the hostilities; it seems to have heightened them to dangerous levels in the first place.

Why has the integration policy model failed to be supported by the evidence on four out of five counts? How can a set of almost axiomatic relationships, supported by years of social science research, be so far off the mark? Part of the reason may be that the policy model has failed to taken into account some of the conditions that must be placed upon contact theory; but we believe that there may be other reasons as well having to do with (1) inadequate research designs, (2) induced versus "natural" factors, and (3) changing conditions in the black cultural climate.

Most of the methodological procedures which have been used to develop various components of the integration policy model are not adequate. The single most important limitation is that they have been cross-sectional designs. That is, the studies have measured aspects of achievement or race relations at a single point in time, with causal inferences being drawn from comparisons of integrated groups with segregated groups. Such inferences are risky at best, since the cross-sectional design cannot control for self-selection factors. For example, the Coleman study showed that integrated black students had slightly higher achievement than segregated students, but it is more than likely that families of higher-achieving students move to integrated neighborhoods in the first place (for reasons of social class or other issues involving opportunity). Thus the cause-and-effect relationship may be the opposite to that suggested by the U.S. Civil Rights Commission report. In the Deutsch and Collins housing study, which found that integrated whites were more tolerant of blacks than segregated whites, it is possible that self-selection factors were operating which led the more tolerant white persons to choose the integrated housing project in the first place. It is fair to say that none of the studies before the ones we have reviewed had an opportunity to study the effects of large-scale induced integration over a reasonable period of time. Yet this is the only way the effects of integration can be sorted out from differences which may originally exist between any two groups of persons.

The second reason for our findings in the race relations realm may have to do with the relatively contrived nature of current school integration programs. In all of the programs reviewed, the integration has been induced by the actions of state or local agencies; it has not occurred in a more natural way through individual voluntary actions. The use of busing, the relatively instantaneous transition from an all-black to an all-white environment, the fact of being part of a readily identifiable group in a new and strange setting, may all combine to enhance racial solidarity and increase separatist tendencies for black students. (We might find a very different picture for black families that move into predominantly white neighborhoods and allow their children some time to adjust to the new environment.) On the other hand, this set of mechanisms would not explain why white student attitudes in the receiving schools also tended to become less favorable to black students, as shown in the Ann Arbor, Riverside, and METCO studies. Moreover, these mechanisms—if they are, in fact, operating—do not invalidate our evaluation of those current policies that focus precisely on induced school integration.

The final major reason why the integration policy model may fail is that the racial climate has changed drastically in the years since the Allport work and the Supreme Court decision. The most noteworthy change, of course, has been in the attitudes of black people. Although the majority of blacks may still endorse the concept of integration, many younger black leaders deemphasize integration as a major goal. Black identity, black control, and black equality are seen as the real issues, and integration is regarded as important only insofar as it advances these primary goals. Some black leaders, albeit the more militant ones, feel that integration might actually defeat attainment of these goals by dispersing the more talented blacks throughout the white community and thereby diluting their power potential. Integration is also seen as having white paternalistic overtones and as the means whereby the white man allays his guilty conscience while ignoring reform on the really important issues. Given these sentiments, school integration programs are seen by blacks not as a fulfillment of the goal of joining white society, but only as a means of obtaining better educational opportunities, which would ultimately lead to a more competitive position in the occupational and economic market.

Integrated schools *per se* are not the real issue; if schools in the black community provided education of the same quality as those in white communities, blacks would not be so interested in busing programs. In fact, when we asked students in the METCO program this question, almost 75 per cent said they would prefer to attend their own community school if it were as good as the suburban schools. Of course, it is by no means clear that the suburban schools actually offer better education. Any improvement in facilities or teacher quality (the ultimate importance of which is called into question by the Coleman report) may be counteracted, as our data show, by stiffer competition and a more hostile and unfriendly student atmosphere. Black leaders who view school integration only as a means to better opportunity must take these other factors into account.

In the context of these new black attitudes, the Allport model may not be applicable, and contact with white students provided by induced school integration may enhance ideological tendencies towards separatism. The reality of contact seems to sensitize black students to the heightened racial identity and separatism that has been growing in the black community since the late 1960's. The explanation may be, in part, that the large socio-economic differences between black and white students are fully recognized only when contact enables them to witness these differences. The difficulty of bridging this gap, coupled with the knowledge that they are viewed by whites as having lower status, leads black students to reject white standards and relationships. They turn inward, as it were, stressing the uniqueness and value of their own race, shutting off contact with whites, and embracing a point of view which endorses separatism as a means toward preserving and elevating their own position. Those black students not in contact with whites may exhibit some of these tendencies due to the over-all contact with white society, but the lack of direct contact postpones the problem or avoids it altogether. This type of "contact-conflict" model may be used to explain the conflicts which occur between two different cultural groups which come into direct contact (e.g., Catholics and Protestants in Northern Ireland; Israelis and Arabs in the Middle East). Whether or not it is applicable on a larger scale, it would fit the data better and would provide a more realistic model for the school integration case.

It would be a mistake, of course, to view the increased racial solidarity of black students as a completely negative finding. The differences between black and white cultures make a certain amount of culture conflict inevitable and even necessary if an integrated society is to be realized. In fact, it would be reasonable *not* to expect conflict—which always accompanies the contact of two cultures—only if we did not believe that a distinct black culture exists in America. Although this belief was held at one time by a large number of social scientists, it is not so popular today. There is now growing recognition that a black culture does exist, at least in the eyes of many ~~blacks~~, and that this culture stresses values, goals, and behavioral patterns that differ considerably from those of the predominant white culture (Jones, 1972; Metzger, 1971).

Up to this point, we have said little about the one positive finding of our research, the "channeling" effect whereby black students who attend white middle-class schools tend to get into higher quality colleges (even though they may not finish college at a higher rate than segregated black students). This finding should be heartening to those who have believed that integration does provide educational opportunities not found in inner-city black schools, although the finding must be considered a tentative one since it has been shown in only two fairly small studies. Also, the positive effects are limited to the college-bound, so that there still may be a question about the benefits of integration for the non-college-bound black students. And it may be that the "channeling" effect works only when the number is relatively small. Nonetheless, this kind of longer-term effect—and perhaps others as yet undiscovered—may turn out to provide a basis for certain types of integration plans.

Policy Implications

It is obvious that the findings of integration research programs have serious implications for policy. Given the momentum which has built up over the last few years for the school integration movement, however, it is likely that in some quarters the data we have presented will be attacked on moral or methodological grounds and then summarily ignored. In other quarters the data may be met with rejoicing over the discovery of a club which can be used to beat back the pro-integration forces. But we hope these extreme reactions will be avoided and that a more balanced interpretation of our findings will prevail.

The most serious question is raised for mandatory busing (or induced integration) programs. If the justification for mandatory busing is based upon an integration policy model like the one we have tested here, then that justification has to be called into question. The data do not support the model on most counts. There may be justifications for school integration other than those in the integration policy model, but then the burden must fall upon those who support a given school integration program to demonstrate that it has the intended effects (with no unintended, negative side-effects). It also must be demonstrated that any such program is at least supported by the black community.

We want to stress this last point. Decisions must be based upon feelings of the black community as well as the white community.

Many liberal educators have been so intent on selling integration to reluctant white communities that they risk the danger of ignoring the opinion of the black community. While many black leaders favor school integration, there are also many black persons who would much prefer an upgrading of schools in their own community. The recent (March 1972) National Black Political Convention in Gary, Indiana, condemned mandatory busing and school integration, arguing that such plans are racist and preserve a black minority structure. These views may not represent the entire black community, but they are indicative of the complexity and heterogeneity of black political opinion.[13] Whether or not a white community wants integration (and there are obviously many that do not), we must take into account the feelings of the group on whose behalf integration is advocated.

Although the data may fail to support mandatory busing as it is currently justified, these findings should not be used to halt voluntary busing programs. For one thing, we have stressed that the studies of integration so far have been over fairly short periods (one to five years), and there are possibilities of longer-term effects which are not visible until adulthood (not to speak of effects on characteristics not measured by the present research). More important, however, we have tentatively demonstrated one very significant longer-term benefit of integration for college-bound blacks. The "channeling" effect, if substantiated by further research, could form a substantial basis for voluntary programs whose focus is upon the college-bound black student. Even for this subgroup, of course, we have documented the trend towards separatist ideology. But the gain in educational opportunity may well outweigh this consequence in the eyes of the black community, as indeed it does now for programs like METCO. In fact, some persons will view these ideological changes, as well as any conflict that may accompany them, as an inevitable consequence of contact between two different cultures. If blacks and whites are ever to live in an integrated culture, they must begin learning and accepting their differences; and this cannot happen without contact. If contact engenders a certain amount of racial friction, many persons will feel the gains from school integration—both long-term and symbolic—more than make up for it.

To these questions of the symbolic and long-run benefits of induced school integration, the existing studies provide no answer. What they do show is that, over the period of two or three years, busing does *not* lead to significant measurable gains in student achievement or interracial harmony (although it does lead to the channeling of black students to better colleges). The available evidence thus indicates that busing is *not* an effective policy instrument for raising the achievement of black students or for increasing interracial harmony. On the other hand, the existing studies do not rule out the possibility that in the longer run, or in other respects, busing may indeed prove to have substantial positive consequences.

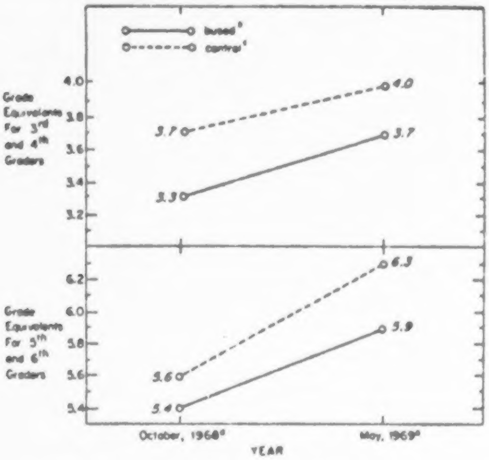
The available evidence on busing, then, seems to lead to two clear policy conclusions. One is that massive mandatory busing for purposes of improving student achievement and interracial harmony is not effective and should not be adopted at this time. The other is that *voluntary* integration programs such as METCO, ABC, or Project Concern should be continued and positively encouraged by substantial federal and state grants. Such voluntary programs should be encouraged so that those parents and communities who believe in the symbolic and potential (but so far unconfirmed) long-run benefits of induced integration will have ample opportunity to send their children to integrated schools. Equally important, these voluntary programs will permit social scientists and others to improve and broaden our understanding of the longer-run and other consequences of induced school integration. With a more complete knowledge than we now possess of this complicated matter, we shall hopefully be in a better position to design effective public education policies that are known in advance to work to the benefit of all Americans, both black and white.

Even in voluntary school integration programs, however, our data indicate that certain steps should be taken which might help alleviate the problems of achievement and race relations. Wholesale integration without regard to achievement levels of white and black students can lead to potentially frustrating experiences. Some selectivity might be desirable so that both groups reflect a similar achievement capacity. Although a certain amount of racial problems may be inevitable, full education of both groups about the possibilities and causes of differences might ameliorate the kind of polarization that would endanger the program.

One must also consider the possibility that other types of integration programs may be more successful. We have said since the outset that our data do not necessarily apply to neighborhood integration brought about by the individual choice of black families. It is possible that such programs would be more successful over the long run, at least in terms of race relations. Being a member of the community might tend to ameliorate black feelings of separateness that are fostered in the relatively contrived busing situation. Whether or not this kind of program could also change standardized achievement levels remains to be seen. Since the differences between black and white achievement are so large and consistent across so many different settings and studies, we must entertain the possibility that no plan of school integration will lessen this gap. Research will have to be continued in this area before the full causal mechanisms are understood and a firm basis is established on which social action can accordingly be planned.

Although we have been critical of some aspects of the connection between social science and public policy in the integration movement, we do not want to imply that their connection should be lessened. On the contrary, the real goals of social science and public policy are not in opposition; the danger is rather that the connection may not be close enough to enable us to make sound decisions. Society can only benefit by those ties which combine the advantage of scientific knowledge with a clear awareness of its limitations.

FIGURE 1. *Reading Achievement—Elementary.*[a]



[a] Metropolitan Achievement Tests; no statistically significant gains when bused compared to controls for either age group.

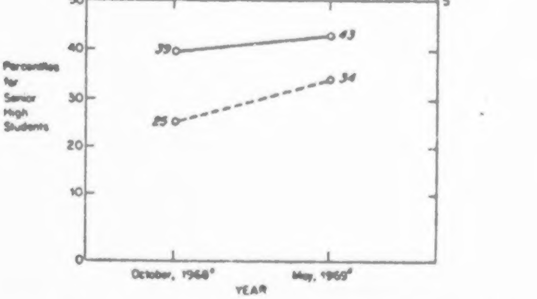
[b] N=88 for Third-Fourth graders and 59 for Fifth-Sixth graders.

[c] N=14 for Third-Fourth graders and 27 for Fifth-Sixth graders.

[d] Full cross-sections for grades:
3-4: bused 3.4 (N=131); control 3.7 (N=38)—not significant (sd= .98)
5-6: bused 5.5 (N=90); control 5.4 (N=55)—not significant (sd=1.5).

[e] Full cross-sections for grades:
3-4: bused 3.7 (N=111); control 3.8 (N=23)—not significant (sd=1.1)
5-6: bused 6.0 (N=74); control 5.8 (N=52)—not significant (sd=1.7).

FIGURE 2. *Reading Achievement—Junior and Senior High.*



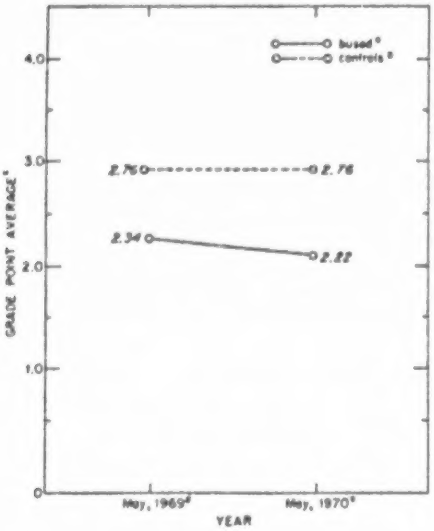
[a] N=123 for junior high and 72 for senior high (no statistically significant changes).

[b] N=27 for junior high and 14 for senior high (no statistically significant changes).

[c] Full cross-section for junior high: bused 7.5 (N=197); control 7.4 (N=74)—n. s. (sd=1.9)
Full cross-section for senior high: bused 36 (N=160); control 28 (N=35)—n. s. (sd=24).

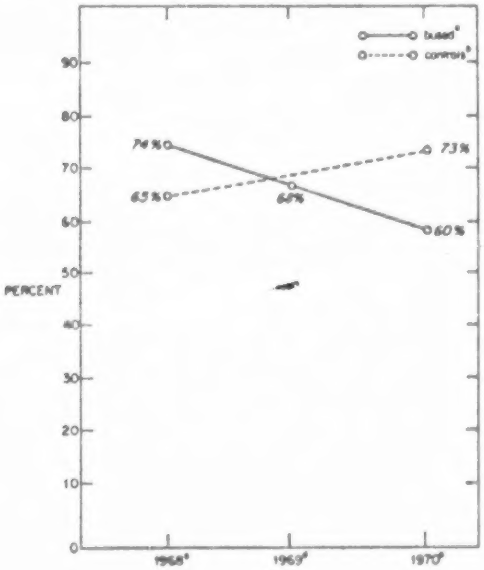
[d] Full cross-section for junior high: bused 7.7 (N=143); control 7.3 (N=47)—n. s. (sd=1.9)
Full cross-section for senior high: bused 44 (N=86); control 34 (N=20)—n. s. (sd=25)

Figure 3. *Grade Point Average—Junior and Senior High.*



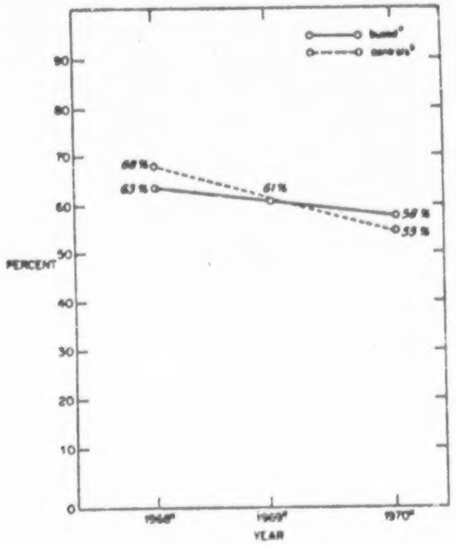
[a] N=165; statistically significant change (.01 level).
[b] N=23; no significant change.
[c] Self-reported; a grade of A is 4.0, B is 3.0, etc.
[d] Full cross-section: bused 2.33 (N=210); control 2.73 (N=59)—significance at .001 level.
[e] Full cross-section: bused 2.20 (N=467); control 2.59 (N=228)—significance at .001 level.

Figure 4. *Per Cent Wanting a Bachelor's Degree.*



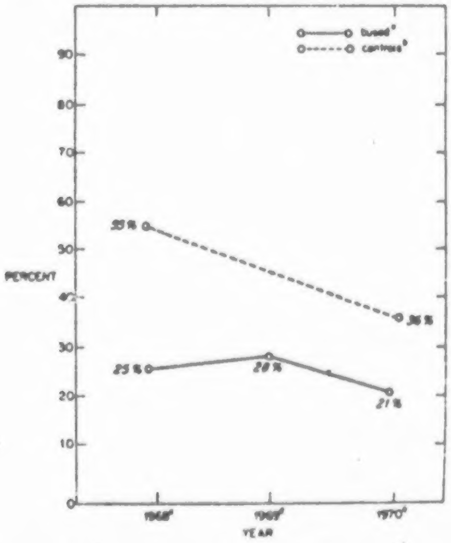
[a] N=132; bused changes significantly different from control changes (.02 level).
[b] N=34.
[c] Full cross-section: bused 71% (N=323); controls 68% (N=87)—not significant.
[d] Full cross-section: bused 69% (N=211); controls 68% (N=60)—not significant.
[e] Full cross-section: bused 60% (N=486); controls 56% (N=228)—not significant.

FIGURE 5. *Per Cent Expecting a Professional or Technical Occupation.*



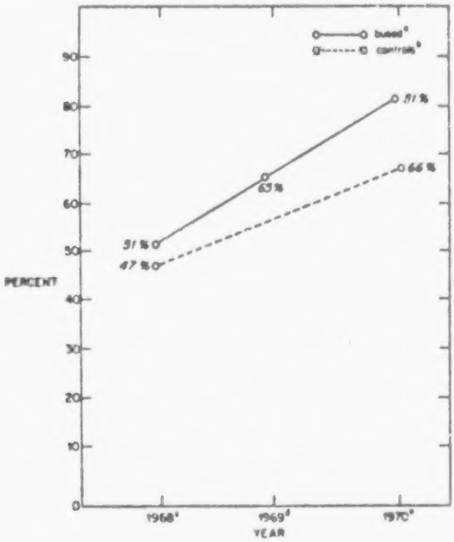
[a]N=130; bused changes not significantly different from control changes.
[b]N=31.
[c]Full cross-section: bused 63% (N=311); controls 55%[e] (N=91)—not significant.
[d]Full cross-section: bused 62% (N=203); controls 52% (N=58)—not significant.
[e]Full cross-section: bused 66% (N=482); controls 66% (N=228)—not significant.

FIGURE 6. *Per Cent Feeling More Intelligent than Classmates.*



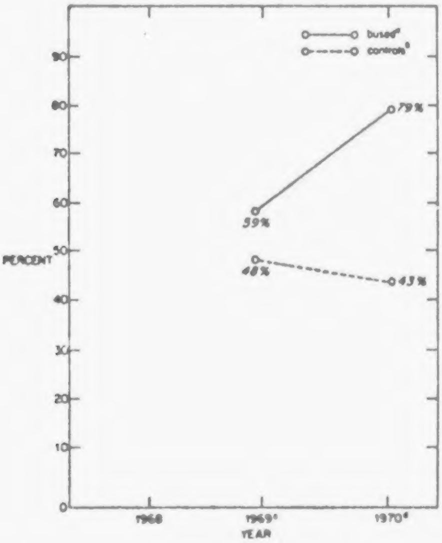
[a]N=130; bused changes not significantly different from control changes.
[b]N=33.
[c]Full cross-section: bused 25% (N=320); controls 47% (N=99)—significance under .01.
[d]Full cross-section: bused 31% (N=211); controls 42% (N=60)—not significant.
[e]Full cross-section: bused 23% (N=483); controls 34% (N=230)—significance under .01.

FIGURE 7. *Per Cent Wanting to be in a School with no More than 50 Per Cent White Students.*



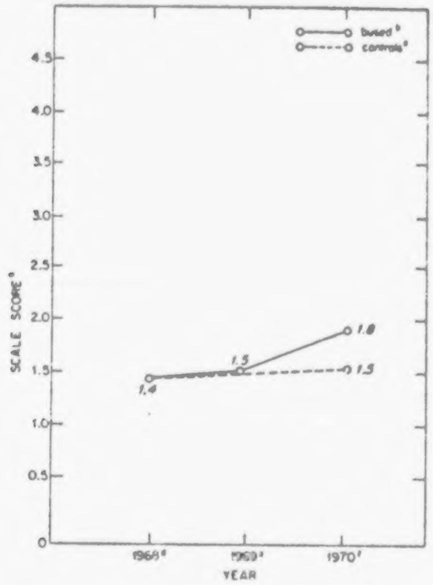
[a]N=133; bused change not significantly different from control change.
[b]N=36.
[c]Full cross-section: bused 56% (N=323); controls 56% (N=97).
[d]Full cross-section: bused 67% (N= 209); controls 59% (N=61)—not significant.
[e]Full cross-section: bused 71% (N=485); controls 62% (N=229)—significance under .001.

FIGURE 8. *Per Cent Favoring Black Power.*



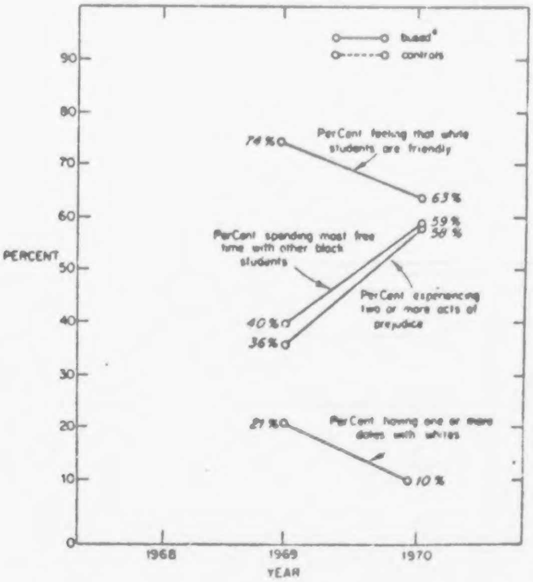
[a]N=167; bused change significantly different from control change (.05 level).
[b]N=21.
[c]Full cross-section: bused 59% (N=211); controls 52% (N=59)—not significant.
[d]Full cross-section: bused 76% (N=479); controls 55% (N=220)—significance under .001.

FIGURE 9. *Separatist Ideology Index.*



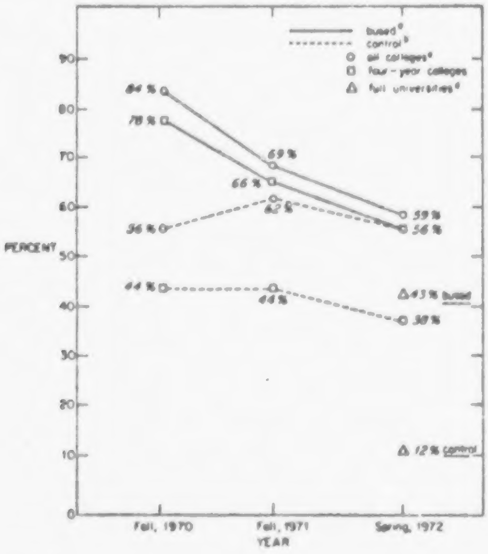
[a] A score of 4 indicates strongest separatist feelings; reliability = .76; sd = .8.
[b] N=135; bused change significantly greater than control change (under .01 level).
[c] N=34.
[d] Full cross-section: bused 1.4 (N=324); control 1.4 (N=97)—not significant.
[e] Full cross-section: bused 1.6 (N=213); control 1.5 (N=60)—not significant.
[f] Full cross-section: bused 1.8 (N=489); control 1.5 (N=230)—significance under .001.

FIGURE 10. *Bused Students Relations with White Students.*



[a] N's range from 146 to 159; all changes significant at or under .02 level.

FIGURE 11. *Per Cent Attending College Full-time.*



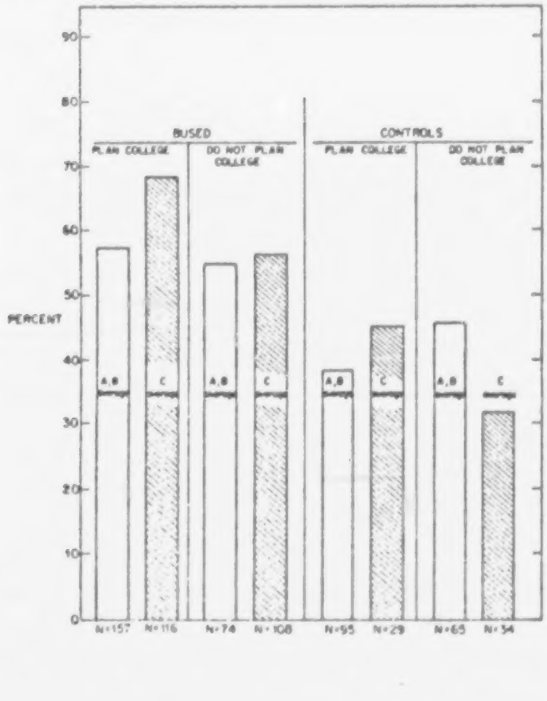
[a] N=32 for all time periods.

[b] N=16 for all time periods.

[c] Includes 2-year junior college; bused change significantly greater than control change (.05 level).

[d] Universities with a graduate program.

FIGURE 12. *Percentage of Bused and Control Students Who Sympathize with the Black Panthers, by College Plans and Academic Performance.*



FOOTNOTES

[1] In spite of these precautions, we must still warn that it is difficult to make comparisons and generalizations when data are derived from different studies. Also, all of the studies we review were done in Northern cities, so that our findings may not be generalizable to the South. Nonetheless, the studies do reveal sufficiently clear and consistent findings in certain areas to enable at least a preliminary assessment of the effects of induced integration in de facto segregated cities of the North.

[2] The data summarized in the reports cited were subjected to extensive reanalysis for the present study.

[3] The number of junior and senior high students participating in the METCO study are as follows: wave one, 357 bused (80 per cent of the total population) and 112 controls (54 per cent of the eligible population): wave two, 229 bused (51 per cent) and 67 controls (32 per cent); wave three, 492 bused (87 per cent) and 232 controls (65 per cent). Because of clerical errors in relating achievement tests to questionnaires, the questionnaire data for waves one and two are based on about 10 per cent fewer respondents in each group. Given the low turnout rates for wave two and other factors (drop-outs, graduates, transfers from control to bused status), our panel of secondary school students with achievement data for both testing periods consists of 195 bused students and 41 control students; for the questionnaire data the panel consists of 135 bused students with data from all 3 waves and 36 control students with data from wave one and wave three. (Only 16 students in the control group had questionnaire data from all three waves. Of the initial sample of control students, over a third had either graduated or transferred into the busing program by the third wave.) In addition, achievement data for elementary grades is available for panels of 147 bused students (66 per cent of the wave one sample) and 41 controls (44 per cent). Given the relatively small proportion of both bused and control students in the panels, there is the chance that the panels are not representative of the full population of bused students and their matched siblings. In the comparisons we make in the next section, therefore, we shall also present data from the complete cross-sections for all waves. The bused panel does not differ significantly from the full cross-section of bused students, and the control panel differs in no way that would affect our main conclusions. In other words, the cross-sectional data can be used as a check on the panel data; the absence of any divergence between the two sets of findings indicates that the attrition of the panels does not invalidate the panel findings. (Analysis was carried out on the 240 bused students who were in both waves one and three, representing 74 per cent of the wave one sample, and there were no important differences between these results and the results from the smaller three-wave panel.)

[4] Research reports for a number of widely-discussed busing programs were not included for various reasons. For example, the Berkeley, California, busing program has not been systematically studied; a report is available, however, which shows that black student achievement is as far behind (or *further* behind) white achievement after two years of integration as before integration (Dambacher, 1971). A study of the Rochester busing program also lacked a proper pre-test design (Rochester City School District, 1970). The study had pre-test and post-test achievement scores from *different tests*, and control groups with generally lower pre-test scores; and it used analysis of covariance to make adjustments for post-test scores. Such statistical adjustments do not necessarily eliminate initial differences between the bused and control groups. A third study—of the Evanston integration program—was received too late for inclusion (Hsia, 1971). This report did show, however, that after two to three years of integration, integrated black students were still as far—or farther—behind white students as before integration. This research also confirmed the reduction in black academic self-concept after integration and the tendency for black student grades to decline. We know of no other studies of induced school integration in the North which have the research design necessary for establishing cause and effect relationship—to wit, a longitudinal design with a control group.

[5] About half of the elementary students and two thirds of the secondary students

were new to the program in 1968. However, there were no differences in gain scores for the newly-bused compared to the previously-bused students.

[6] Initial differences between the newly-bused and the previously-bused revealed no particular pattern; for third and fourth graders the previously-bused were higher by .15 points, but for fifth and sixth graders the newly-bused were higher by .5 points; in any event there were no statistically significant differences in gain scores.

[7] The newly-bused students were somewhat higher than the previously-bused initially for both junior and senior high students (.3 and 2.5, respectively), but the differences were not significant.

[8] The control school was a "naturally" integrated school with an increasing proportion of black students; it was scheduled to be closed down the following year.

[9] The pattern of black achievement falling further behind white achievement at later grade levels has been extensively documented (Coleman, 1966; Rosenfeld and Hilton, 1971).

[10] Even these two significant results might not have occurred if the data had been analyzed differently. The author controlled for pre-busing scores using analysis of covariance rather than analyzing gain scores (see footnote 4). Since the author did not present pre-test means, we cannot know if the bused and control groups differed initially.

[11] The grade-point system used here has an A as 4 points, B as 3 points, and so on.

[12] The Ann Arbor study did include a measure of occupational aspiration, but the variation was so great (not to speak of the coding problems presented by such choices as "superman" and "fairy princess") that interpretation was difficult.

[13] A recent Gallup Poll reported that 46 per cent of a national non-white sample are opposed to busing for racial balance; 43 per cent were in favor, and 11 per cent were undecided (August 1971).

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Busing: a Review of "The Evidence"

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David Armor's "The Evidence on Busing," (*The Public Interest*, No. 28, Summer 1972) presented a distorted and incomplete review of this politically charged topic. We respect Armor's right to publish his views against "mandatory busing." But we challenge his claim that these views are supported by scientific evidence. A full discussion of our reading of the relevant research would be too lengthy and technical for the non-specialist. We must limit ourselves here to outlining and discussing briefly our principal disagreements with Armor, which center on four major points.

First, his article begins by establishing unrealistically high standards by which to judge the success of school desegregation. "Busing," he claims, works only if it leads—in *one* school year—to increased achievement, aspirations, self-esteem, interracial tolerance, and life opportunities for black children. And "busing" must meet these standards in *all* types of interracial schools; no distinction is made between *merely desegregated* and *genuinely integrated* schools.

This "integration policy model," as it is labeled, is *not* what social scientists who specialize in race relations have been writing about over the past generation. Indeed, Armor's criteria must surely be among the most rigid ever employed for the evaluation of a change program in the history of public education in the United States.

Second, the article presents selected findings from selected studies as "*the* evidence on busing." The bias here is twofold. On the one hand, the few studies mentioned constitute an incomplete list and are selectively negative in results. Unmentioned are at least seven investigations—from busing programs throughout the nation—that meet the methodological criteria for inclusion and report *positive* achievement results for black students. These seven studies are widely known.

On the other hand, only cursory descriptions are provided of the few investigations that are reviewed. Mitigating circumstances surrounding black responses to desegregation are not discussed. For example, we are not told that educational services for the transported black pupils were actually *reduced* with the onset of desegregation in three of the cited cities. In addition, negative findings consistent with the paper's anti-busing thesis are emphasized, while positive findings from these same cities are either obscured or simply ignored. Newer studies from three of the cited cities showing more positive results are not discussed.

Positive findings are also obscured by the utilization of an unduly severe standard. The achievement gains of black students in desegregated schools are often compared with white gains, rather than with the achievement of black students in black schools. But such a standard ignores the possibility that *both* racial groups can make more meaningful educational advances in interracial schools. Indeed, this possibility actually occurs in three of the cities mentioned by Armor. Yet he does not inform us of this apparent dual success of desegregation; instead, "busing" is simply rated a failure because the black children did not far outgain the improving white children.

Third, the paper's anti-busing conclusions rest primarily on the findings from one short-term study conducted by Armor himself. This investigation focused on a voluntary busing program in metropolitan Boston called METCO. Yet this study is probably the weakest reported in the paper. Our reexamination of its data finds that it has extremely serious methodological problems.

Two major problems concern deficiencies of the control group. To test the effects of "busing" and school desegregation, a control group should obviously consist exclusively of children who neither are "bused" nor attend desegregated schools. But our check of this critical point reveals that this is not the case. Among the 82 control students used to test the achievement effects of METCO at all 10 grade levels, we obtained records on 55. Only 21 of these 55 actually attended segregated schools in the tested year of 1968-69. Many of the 34 (62 per cent) desegregated children by necessity utilized buses and other forms of transportation to get to school.

Incredible as it sounds, then, Armor compared a group of children who were bused to desegregated schools with another group of children which included many who *also* were bused to desegregated schools. Not surprisingly, then, he found few differences between them. But this complete lack of adequate controls renders his METCO research of no scientific interest in the study of "busing" and school desegregation. Since this METCO investigation furnished the chief "evidence" against "busing," Armor's conclusions are severely challenged by this point alone.

Serious, too, is an enormous non-response rate in the second test administration, a problem alluded to by Armor only in a footnote. For the elementary students, only 51 per cent of the eligible METCO students and 28 per cent of the eligible "control" students [illegible] part in both of the achievement test sessions. The achievement [illegible] for the junior and senior high students are also rendered virtually meaningless by the participation of only 44 per cent of the eligible METCO students and 20 per cent of the eligible "control" students. Compare these percentages to the survey standard of 70 to 80 per cent, and one can appreciate the magnitude of the possible selection bias introduced into the METCO results by the widespread lack of student participation. Efforts to compensate for these high non-response rates through the use of cross-sectional samples that also suffer from extensive non-response are insufficient.

There are other problems in the METCO study. Some children were included who initially performed as well as the test scoring allowed and therefore could not possibly demonstrate "improvement"; in fact, these pupils comprise one sixth of all the junior high pupils tested for achievement gains in reading. Moreover, the conditions for the third administration of the attitude tests were different for the METCO students and the "controls": The former took the tests at school and the latter took them at home with their parents as proctors. Even apart from the severe control group problems, then, the faulty research design makes any conclusion about differences in racial attitudes between the two groups hazardous.

The inadequate discussion of the METCO study in Armor's article makes it virtually impossible for even the discerning reader to evaluate it properly. We uncovered its many errors only from unpublished earlier materials and from reanalyzing the data ourselves. The METCO discussion is inadequate in other ways. Differential statistical standards are employed, with less rigorous standards applied to findings congruent with the article's anti-busing thesis; attitude differences among METCO schools are not shown; and misleading claims of consistency with other research findings are made.

From this assortment of "evidence," Armor concludes authoritatively that "busing" fails on four out of five counts. It does not lead, he argues, to improved achievement, grades, aspirations, and racial attitudes for black children; yet, despite these failures, he admits that desegregated schools do seem somehow to lead more often to college enrollment for black students.

The picture is considerably more positive, as well as more complex, than Armor paints it. For example, when specified school conditions are attained, research has repeatedly indicated that desegregated schools improve the academic performance of black pupils. Other research has demonstrated that rigidly high and unrealistic aspirations actually deter learning; thus, a slight lowering of such aspirations by school desegregation can lead to better achievement and cannot be regarded as a failure of "busing." Moreover, "militancy" and "black consciousness and solidarity" are not negative characteristics, as Armor's article asserts, and their alleged development in desegregated schools could well be regarded as a further success, not a failure, of "busing." Finally, the evidence that desegregated education sharply expands the life opportunities of black children is more extensive than he has indicated.

Consequently, Armor's sweeping policy conclusion against "mandatory busing" is neither substantiated nor warranted. Not only does it rely upon impaired and incomplete "evidence," but in a real sense his paper is not about "busing" at all, much less "mandatory busing." Three of the cities discussed—among them Boston, the subject of Armor's own research—had *voluntary*, not "mandatory busing."

"Busing" was never cited as an independent variable, and many of the desegregation studies discussed involved some children who were not bused to reach their interracial schools. Indeed, in Armor's own investigation of METCO, some of the METCO children were not bused while many of the controls were.

Fourth, objections must be raised to the basic assumptions about racial change that undergird the entire article. Public school desegregation is regarded as largely a technical matter, a matter for social scientists more than for the courts. Emphasis is placed solely on the adaptive abilities of black children rather than on their constitutional rights. Moreover, the whole national context of individual and institutional racism is conveniently ignored, and interracial contact under any conditions is assumed to be "integration."

Now we wish to pursue these basic points in more detail.

I

Unrealistic standards for judging the effects of "busing." The article advances an "integration policy model" which it claims grew out of social science and guided "the integration movement." The model allegedly maintained that *all* school desegregation would result in improved black achievement, aspirations, self-esteem, racial attitudes, and educational and occupational opportunities (Armor, p. 96). This interpretation of "the integration policy model" is at sharp variance with what specialists in this field have been writing over the past generation.[1] The fundamental premise of social scientists over these years was that racial segregation as it is typically imposed in the United States leads directly to a multitude of negative effects not only for black America but for the nation at large. (The evidence for this premise is extensive, and Armor does not contest the premise.) But social scientists have not made the error of contending that because enforced racial segregation has negative effects, *all* racial desegregation will have positive effects. It requires little imagination to think of hostile conditions of school desegregation that would limit its benefits for both races.

At the heart of this misconception is a persistent misreading of Gordon Allport's (1954) theory of intergroup contact. Armor cites a quotation from Allport delineating the crucial conditions that he held to be essential before positive effects could be expected from intergroup contact: equal status, common goals, institutional supports, and a non-competitive atmosphere that is likely to lead to "the perception of common interests and common humanity." Yet Armor summarizes this quotation by stating: "The clear key to breaking the vicious circle, then, was contact." This is *not what Allport wrote*; the key, Allport argued, is contact *under particular conditions*.

Later in his article Armor adds a brief discussion of one of these conditions—equal status between the two groups. Allport and other contact theorists have maintained that this condition is met by equal status, dignity, and access to resources *within* the contact situation itself (e.g., Pettigrew, 1971). Armor reinterprets this condition so that it is met only if the two groups bring equal societal status *to* the situation, a rigorous test indeed in a society where racial discrimination has long been endemic. We know of no relevant contact research that supports this reinterpretation of the theory, and vague references to conflict in Northern Ireland and the Middle East hardly suffice as evidence. But armed with his own reinterpretation, Armor (p. 111) writes: "Therefore, we have to question whether integration programs for black and white children can ever fulfill the equal status condition as long as socio-economic and academic inequalities are not eliminated." Here the misreading of Allport's contact theory is fashioned into not only an explanation of presumed "negative" results from interracial schools but a not-so-subtle rationale for at best gradualism and at worst a return to racially segregated education throughout the nation.

The basic weakness, then, in this description of an "integration policy model" is that it assumes positive results for *all* interracial schools rather than for just those meeting the conditions for optimal contact. This erroneous assumption is best illustrated by reference to the chief policy document relied upon by Armor: *Racial Isolation in the Public Schools,* issued by the U.S. Commission on Civil Rights (1967). The quotation Armor cites from this report emphasizes the harmful effects of racially isolated schooling, and it does not specify all of the five hypotheses which he somehow deduces from it. That the Commission clearly understood that interracial schools in and of themselves are not necessarily effective schools is demonstrated by the following passage which was not quoted:

> Whether school desegregation is effective depends on a number of factors. These include the leadership given by State and local officials; the application of the plan to all schools in the community; the measures taken to minimize the possibility of racial friction in the newly desegregated schools; the maintenance or improvement of educational standards; the desegregation of classes within the schools as well as the schools themselves, and the availability of supportive services for individual students who lag in achievement.

The Commission Report discusses these factors in detail for over eight pages, factors neither mentioned nor measured by Armor. "The integration policy model," then, sets up unrealistic standards for judging the effects of "busing" by ignoring the conditions specified by the two principal sources cited. Its five criteria for success constitute a "straw man," far exceeding the standards applied for the evaluation of other educational programs.

The critical distinction between desegregation and integration is ignored. The racial desegregation of schools is not a static but a complex, dynamic process. To evaluate it fairly, the critical conditions under which it takes place must be assessed. For this purpose, it is important to distinguish between desegregation and integration. Desegregation is achieved by simply ending segregation and bringing blacks and whites together; it implies nothing about the quality of the interracial interaction. Integration involves Allport's four conditions for positive intergroup contact, cross-racial acceptance, and equal dignity and access to resources for both racial groups.

The neglect of this distinction besets not only Armor's theoretical contentions but his empirical ones as well. No effort is made to look inside of the schools at the *process* of desegregation. The cursory descriptions of the "busing" investigations tell virtually nothing about the conditions of interracial contact that prevailed. (Indeed, a few of the initial reports of these studies failed to describe contact conditions.) For example, we should have been informed by Armor that transported black children in some Riverside schools arrive and leave earlier than the untransported white children and that they have separate reading classes—hardly practices likely to generate interracial contact and lead to integration (Singer, 1972). And we might have been told that minority students in Riverside who were most likely to be in interracial classrooms (high-ability students) performed far better after desegregation than before (Purl, 1971).

In fact, in his Detroit deposition for school segregation, Armor admitted that he had no measures or knowledge in his own study of the METCO schools of such crucial factors as teacher expectations and preparation, the racial composition of the faculties, ability tracking practices, and curriculum changes. A review of "the evidence on busing" is misleading at best without consideration of these indicators of the desegregation versus integration distinction.

II

A biased and incomplete selection of studies. Armor's article makes no attempt to review all of the available evidence on "busing," as its title implies. Instead, the reader is told about only a small number of studies, selected with an apparent bias toward those reporting few positive effects. One hint of this selection is found in Armor's footnote 1, where we learn that he arbitrarily excludes the entire southern United States from his purview, though this severe restriction is not indicated either in his title or his conclusions against "mandatory busing." This unexplained exclusion seems unwarranted, for the bulk of court-ordered "mandatory busing" has occurred in the South.

Armor omits at least *seven* key desegregation investigations—only one of which is from the South—that reach conclusions in conflict with those of his paper. All seven of these desegregation programs involved "busing," and all seven of the studies meet the paper's two stated criteria for inclusion: longitudinal data and an adequate control group. Table 1 summarizes these neglected research reports. Though five of them spanned only one school year, all seven reach *positive* conclusions concerning the effects of school desegregation upon the academic performance of black children. Moreover, none of them found that the process lowered white academic performance. No matter how Armor might wish to view these studies in

TABLE 1. *Seven Neglected Desegregation Investigations*

STUDY		DESIGN				ACHIEVEMENT RESULTS	
PLACE	AUTHOR(S)	GRADE LEVEL	TYPE OF COMPARISON	CONTROL VARIABLES	TIME OF DESEGREGATION	FOR BLACK CHILDREN	FOR WHITE CHILDREN (IF TESTED)
SOUTHERN DESEGREGATION							
Goldsboro, N.C.	King & Mayer (1971)[1] McCullough (1972)	7-11 cohort	White students and trend during segregation	Convergence curves for regression to mean effects and pre-desegregation trends	2 years	Statistically significant gains in reading closing part of black/white differential; gains in math scores do not close racial gap; gains greatest for initially high achievers	Both reading and math gains; gains greatest for high achievers
SUBURBAN BUSING PROGRAMS							
Newark-Verona, N.J.	Zdep & Joyce (1967)	1-2	Comparable non-transfers	--	1 year	Statistically significantly greater total achievement gains for desegrated in both grades	No negative effects (only difference favors the desegregated)
Rochester-West Irondequoit, N.Y.	Rock *et al.* (1968)	K-2	Comparable non-transfers	Teachers' ratings of ability	3 years	Statistically significantly greater verbal, reading, and math achievement gains on 13 of 27 comparisons for desegregated; no significant differences on remaining 14 comparisons	No negative effects (only differences favor the desegregated)

TABLE 1. *Continued*

STUDY		DESIGN				ACHIEVEMENT RESULTS	
PLACE	AUTHOR(S)	GRADE LEVEL	TYPE OF COMPARISON	CONTROL VARIABLES	TIME OF DESEGREGATION	FOR BLACK CHILDREN	FOR WHITE CHILDREN (IF TESTED)
NORTHERN CENTRAL CITY DESEGREGATION							
Buffalo, N.Y.	Banks & DiPasquale (1969)	5-7	Comparable non-transfers	—	1 year	2½ months greater achievement gain for the desegregated	No negative effects
New York, N.Y.	Slone (1968)	4	Comparable non-transfers	—	1 year	Statistically significantly greater math achievement gains, and somewhat greater reading gains (p<.10), for desegregated	No negative effects
Philadelphia, Pa.	Laird & Weeks (1966)	4-6	Comparable non-transfers	I.Q., grade and sex	1 year	Statistically significantly greater reading, and somewhat greater math, achievement gains for desegregated in fourth and fifth grades	—
Sacramento, Cal.	Morrison & Stivers (1971)	2-6	Comparable non-transfers	—	1 year	Statistically significantly greater gains on three of ten comparisons (5 classes on 2 tests) and greater gains on 6 more, for desegregated	—

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[1] Similar results for a cohort of second through fifth grade students have also been obtained in Goldsboro. After two years of desegregated education the *standardized* verbal and mathematical computation achievement scores of both the black and white students had risen. The verbal gains, though not the mathematical computation gains, closed the racial differential slightly. Robert R. Mayer, University of North Carolina at Chapel Hill, personal communication.

retrospect, there was no reason for their omission in a paper that claimed to present "*the* evidence on busing."

Space limitations prevent a discussion here of these neglected investigations, but five points should be made about them. First, a number of them share methodological problems with the studies that Armor did choose to discuss. Indeed, reviewers of this research literature have uniformly found it methodologically weak (Matthai, 1968; O'Reilly, 1970; St. John, 1970; Weinberg, 1968). Second, these seven by no means exhaust the relevant research literature that meets the paper's dual criteria for inclusion. There are studies on desegregation without busing that reveal positive achievement effects (e.g., Anderson, 1966; Fortenberry, 1959; Frary and Goolsby, 1970). There are a few others that were also left out that found no significant achievement gains associated with desegregation (e.g., Fox, 1966, 1967, 1968). From the perspective of the desegregation versus integration distinction, this mixed picture is precisely what one would expect. Third, these seven studies are not obscure reports; all but the more recent Goldsboro and Sacramento studies are cited in one or more of the standard reviews available on the topic (Matthai, 1968; O'Reilly, 1970; St. John, 1970; Weinberg, 1968).

Fourth, the positive achievement effects revealed by these studies are often not just statistically significant (Armor's criterion) but, more important, are educationally significant as well. The study from Buffalo by Banks and DiPasquale (1969), for example, found a 2.5 month achievement advantage for the desegregated children. Over a 12-year school career, were such an advantage to be replicated each year, this would constitute 2.5 extra years of achievement —a critical addition that could mean the difference between functional illiteracy and marketable skills. Finally, these seven studies do not measure the "pure" effects of desegregation any more than those cited by Armor. Probably there are no instances of school desegregation that are not confounded with curriculum changes, school quality, and other educational alterations. But our point is made: The few studies mentioned in Armor's article constitute an incomplete list and are selectively negative in results.

Biased and incomplete descriptions are provided of the few studies discussed. The cursory reviews of the few studies that Armor did select for attention allow only biased and incomplete descriptions. Since his article never probes the process going on inside the schools, it repeatedly omits mitigating circumstances surrounding black responses to desegregation. For example, no mention is made of the fact that educational services for the transported black students in Ann Arbor, Riverside, and Berkeley were actually *reduced* with the onset of desegregation (Carrigan, 1969; Frelow, 1971; and Purl, 1971). Nor is there any indication that Riverside initially placed many of its bused minority children in the same classrooms, and often with low-achieving white children (Henrick, 1968). No "integration model," not even the new one devised by Armor, is fairly tested under such conditions.

Moreover, the positive findings that favor desegregation in these studies are often obscured or simply ignored by Armor. In the case of Hartford, for instance, only Wechsler I.Q. data are cited, while extensive results from the Primary Mental Abilities Test and measures of school achievement go undiscussed. When all three types of tests are considered together, a clear pattern of larger gains for the transported children emerges for all four grades from kindergarten through the third grade (Mahan, 1968). Likewise, black pupils in Ann Arbor attained a substantially higher mean I.Q. after one year of desegregation, but this fact is lost from sight by the use of a white comparison. A range of interesting results from Riverside is also omitted. Purl (1971) found that: (a) Bused students who were more dispersed in the classes of their receiving schools outperformed those who–through ability grouping or other means–were clustered in near-segregation style. (b) While the mean achievement of minority pupils with low initial ability scores declined relative to grade level, the achievement of minority pupils with high initial ability scores rose in the desegregated schools. (c) Minority children transported to schools characterized by higher achievement of the receiving white students gain significantly more than comparable minority children transported to schools characterized by low achievement, an effect not linked to the social class levels of the receiving students. (d) The one group of bused minority students who began their schooling in interracial schools achieved better than those who had first experienced segregated education.

The incomplete descriptions also fail to reveal major methodological weaknesses in these cited studies. The Berkeley (1971a) investigation, as a case in point, utilized different tests for comparison over time, precisely the same defect for which an investigation in Rochester (1971) showing a number of positive results is rejected without discussion. The White Plains (1967) investigation employs inadequate control groups drawn from earlier time periods, a faulty procedure that confounds the effects of events over time with those of desegregation.[2] Indeed, the negative conclusions of a follow-up study in Ann Arbor are given without recording the fact that it failed to meet either of the criteria purportedly used for inclusion, for it had no control group whatsoever nor did it gather longitudinal data on the same test (Aberdeen, 1969; Carrigan, 1969).

Finally, several newer reports on these same cities that present results favorable to desegregation are not utilized. Mahan and Mahan (1971), for example, provide more refined analyses on the Hartford achievement data. Pooling the first, third, and fifth grades,[3] they show that the desegregated children in Project Concern do significantly better after two years than their comparable segregated controls on the Wechsler I.Q. and on both the verbal and quantitative scores of the Primary Mental Abilities Test.

Though he cited a Master's thesis on New Haven desegregation, Armor failed to cite a better-known doctoral dissertation on the same city.[4] Samuels (1971) studied 138 black students who had all attended inner-city kindergartens in 1969 and then were assigned *randomly* to one of three conditions: bused into suburban schools, received intensive compensatory education in New Haven schools, or attended regular New Haven schools. After two years, Samuels found that the bused children possessed significantly higher reading scores than the two control groups as well as higher word knowledge scores that approach statistical significance ($p<.07$). Their self-image scores were slightly higher, but not significantly different. Comparisons on word analysis and mathematics yielded no significant differences.

In Berkeley, Frelow (1971) studied the third and fourth grade achievement of poor children, most of them black, over a six-year period that witnessed rapid changes in the city's schools. Though this design, like that used in White Plains, lacks contemporaneous controls, he found that achievement scores rose significantly after the introduction of compensatory programs and went slightly higher still after desegregation despite a reduction in services. Frelow concludes that "when gains are measured against level of instructional services, desegregation produces the most prominent achievement results."

The use of white control groups is inadequate and often misleading. The contention that black children will learn more in integrated than in segregated schools is not tested when black data are compared with those of white control groups. Moreover, the use of a desegregated white control group ignores the possibility that *both* whites and blacks could benefit significantly from integration without "the racial gap" in achievement closing at all. As a matter of fact, precisely this possibility occurs in Riverside, Berkeley, and Ann Arbor—though this is not mentioned by Armor and is allowed to mask black gains in desegregated schools.

For Riverside, Armor reports that even for the fourth-grade group that had been desegregated since kindergarten "the minority/white gap had not diminished. . . ." But actually the white test scores being used for a comparison had improved after desegregation relative to national norms (Purl, 1971). Thus, the fact that the minority students held the "gap" constant represents improvement; this is indicated, too, by these minority students' relative gains in grade equivalents.

For Berkeley, Armor reports in a footnote that "black achievement is as far behind (or *further* behind) white achievement after two years of integration as before integration." But *both* white and black grade equivalents in grades one, two, and three went up across age cohorts after two years of desegregation; yet since they rose in virtually equal amounts, the "black/white gap" was not narrowed (Berkeley, 1971a, 1971b). The measure here is grade equivalents, not percentiles. Thus, keeping "the racial gap" from expanding is an accomplishment in itself for desegregation, since the typical result of segregated schools is an ever-widening "racial gap" in grade equivalents (Coleman *et al.*, 1966; Mosteller and Moynihan, 1972).

The most extreme case of this misleading use of white controls, however, occurs for Ann Arbor (Carrigan, 1969). Here the bused black students were "a multi-problem group" with a greater incidence of "general health problems" and behavioral "problems requiring special professional help." Yet they gained an average of 3.86 I.Q. points during their first year of desegregation. They were compared with generally high-status white children, many of whom came from academic families, who gained an average of 4.28 I.Q. points. "Busing" failed, in Armor's terms, because "the racial gap" did not close. But can a program which utilizes fewer services with a multi-problem group of youngsters, and yet is associated with a nearly four-point average increase in I.Q. during one school year, be unquestionably ruled a failure? We think not, even if these "bused" pupils did not gain more than high-achieving white youngsters from a university community.

This point represents a crucial difference between our perspective and Armor's. We believe it to be unrealistic to expect any type of educational innovation to close most of the racial differential in achievement while gross racial disparities, especially economic ones, remain in American society. Furthermore, we know of no social scientists who ever claimed school desegregation alone could close most of the differential. We are pleased to note the many instances where effective desegregation has apparently benefited the achievement of both black and white children, and where over a period of years it appears to close approximately a fourth of the differential.

But to insist that "mandatory busing" must close most of the achievement differential by itself in a short time or be abolished is, to understate the case, an extreme position. Indeed, Armor himself has wavered on this point. In *The Public Interest* he wrote: "The ideal control group, of course, would consist of black students who are identical to the integrated students in every way except for the integrated experience" (Armor, p. 97), though white students in the same school constituted an "adequate" control. Later, however, while testifying in support of anti-busing legislation before the Senate Subcommittee on Education, he used white pupils as the critical comparison. This stern criterion leads to some strange conclusions. A desegregation program that dramatically raises the achievement levels of both racial groups is judged a failure when it does not close most of the racial disparity, but another desegregation program that entirely closes the gap by raising the blacks' scores and *lowering* the whites' scores would have to be deemed a success!

III

Serious weaknesses in the METCO research. Armor's article relies most heavily upon his own research on Boston's suburban program known as METCO. Far greater space—including a dozen graphs—is devoted to the METCO research than to all of the other research combined; and the METCO work is the only investigation that is relied upon for support of all five of the conclusions concerning the effects of "busing." Yet a careful reanalysis of these METCO data reveals a host of serious weaknesses that center on five concerns: (a) the unrepresentativeness of the METCO program, and problems regarding (b) the control group, (c) the sample, (d) test administration, and (e) the analysis.

a. *Unrepresentativeness of METCO program.* Not only is "busing" not "mandatory" in METCO, but the program is highly atypical of desegregation efforts with "busing" around the nation. METCO is a voluntary program, and it has disproportionately attracted middle-class black students. This class bias may help explain why METCO children in the first year of the program attained a higher average I.Q. than the white national average (Archibald, 1967) and why in Figures 1 and 2 of Armor's article all 10 grade levels show relatively high achievement scores. Moreover, METCO children comprise only a minute fraction of their student bodies, with less than four per cent in any one school in 1969. Black faculty are rare in virtually all of the METCO schools. Indeed, some METCO schools have had all-white staffs, and until recently even all of the bus drivers were white. Thus, given METCO's "tokenism" in students and staff, as well as its social class bias, direct generalizations from this program to "busing" throughout the United States appear dubious at best.

b. *Control group problems.* The most serious weakness of the METCO research involves the students who were employed as "controls." The study's design obviously requires that none of these control students were either desegregated or "bused." But a careful review of the available records reveals that this essential condition is not met.[5] Among the 41 "control" youngsters at the elementary level, we obtained records on 17. Only seven of these 17 pupils were actually attending segregated schools during 1968-69, while 10 (59 per cent) were attending desegregated schools. Similarly, among the 38 (out of a total of 41) "controls" at the junior and senior high levels whose records we obtained, only 14 were in segregated schools during the tested year, while 24 (63 per cent) were attending desegregated schools.

All told, then, of the 55 students whose records were secured, 34 (62 per cent) actually went to desegregated schools and many of them used buses and other means of transportation.[6] Even if we assume that all 27 students whose records were unavailable went to segregated schools (an unlikely possibility), these data still mean that at least 41 per cent (34/82) of the "control" students were in fact experiencing a racially desegregated education. Indeed, these desegregated "controls" were generally in schools with a greater interracial mixture than those attended by the METCO children.

This failure of the METCO study to have an adequate control group cannot be overemphasized. It means that *all* of the METCO comparisons between the METCO and "control" children in Armor's article are not valid indications of any differences attributable to "busing" or school desegregation. For such comparisons may also reflect the different effects of suburban versus inner-city desegregation and token versus substantial desegregation. In short, we believe this weakness alone eliminates the METCO study from being relevant to "the evidence on busing," and makes our further criticisms of the study almost superfluous.

Other problems involve the use of siblings of METCO students as "controls." "This design feature by no means guarantees the equating of the groups," wrote Herbert Walberg (1969) in the initial write-up of this investigation, "since there may be bias in the family's choice of the child to be bused. . . ." Indeed, there is potential bias in the selection by families, but the direction is not clear. The academically superior child might be chosen more often by his parents; or, as METCO officials suspect, the child having difficulties in Boston's schools might be chosen more often. Moreover, the use of siblings for controls tends to confound sex, grade level, and age with family climate and social class.

c. *Sample problems.* The METCO research suffers, too, from both small numbers and a severe loss of eligible subjects. Limited sample size makes finding statistically significant differences in achievement between the experimental and "control" groups less likely; or, put differently, small sample sizes aid in supporting the anti-desegregation thesis of the article. The extent of this problem is shown in Table 2, which provides the sample sizes by grade level. The question arises as to how large the METCO group dif-

TABLE 2. *METCO Sample Sizes by Grade Level and Type of School*

			TYPE OF SCHOOL ATTENDED BY "CONTROLS"		
GRADE LEVEL	METCO[1]	"CONTROL"	SEGREGATED	DESEGREGATED	UNAVAILABLE
3rd & 4th	88	14	2	3	9
5th & 6th	59	27	5	7	15
Elementary School Totals	**147**	**41**	**7**	**10**	**24**
7th	47	11	6	5	0
8th	31	10	4	5	1
9th	47	6	1	4	1
Junior High School Totals	**125**	**27**	**11**	**14**	**2**
10th	53	4	0	3	1
11th	18	8	3	5	0
12th	1	2	0	2	0
Senior High School Totals	**72**	**14**	**3**	**10**	**1**

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[1] These data are taken from our reconstructed data tapes. Armor lists 123 junior high METCO students in his Figure 2, but he inadvertently dropped two cases.

ferences in achievement would have had to be before the sample sizes employed could have detected a statistically significant difference even at the .05 level of confidence? By our calculation, the answer at the junior high level, for example, is that the METCO students would have had to gain at least 0.4 of a grade *more* in average achievement on the test norms than the "control" group.[7] This is an unrealistic expectation over a duration of only *seven* months, especially for comparisons among children who are close to grade level. An educationally meaningful average gain difference over such a short period would have been 0.2 of a grade more for the METCO students. But this would have required sample sizes of roughly 200 in each group to have reached statistical significance for a two-tailed test. Instead, only 125 METCO and 27 "control" junior high students were tested. The same point can be made about the other grade levels. We conclude, therefore, that the criterion of statistical significance was inappropriate for evaluating the METCO program when the sample sizes were so small.

The loss of subjects occurred in two stages. Among the elementary students, in the first test administration in October 1968, there was a 23 per cent loss of eligible METCO students and a 35 per cent loss of eligible "control" students.[8] In the second test administration in May 1969, 34 per cent of the METCO and 56 per cent of the "control" students who had taken the tests seven months earlier did not retake them. Combined, then, the achievement results on these students included only 51 per cent of the eligible METCO and 28 per cent of the eligible "control" participants. The situation was even worse for the junior and senior high students, whose achievement results were based on only 44 per cent of the eligible METCO and only 20 per cent of the eligible "control" participants. Furthermore, only eight per cent of the "controls" took part in all three test administrations.

Contrast these percentages with Useem's (1971, 1972) response rate of 87 per cent in her study of white students in METCO schools. Compare them, too, with the accepted survey research standard of at least a 70 to 80 per cent response rate, and one can appreciate the high level of potential bias introduced by this loss of subjects from Armor's study. An attempt to compensate for these impaired data by utilizing cross-sectional results is not an adequate remedy for many reasons, some of which are provided by Armor himself when he condemns cross-sectional investigations. Besides, there was a considerable loss of eligible subjects, and thus potential bias, in the cross-sectional data as well.

d. *Test administration problems.* "The control group," Armor argued in his Detroit deposition for school segregation, "has to be measured in the same way that the treated group is." He further maintained that "we must measure them before the treatment, and put one through the treatment and one not, to assess the effect of a program." We agree, but his METCO research failed on both counts.

The third testing in May 1970, which involved attitudes but not achievement, took place under markedly contrasting conditions for the experimental and control groups. While the METCO children answered the questions in school, the control children answered them at home through a mailed questionnaire that explicitly requested the parents to serve as proctors. This procedure risks two related sources of bias. A wealth of research has demonstrated how different situations can lead to sharply different responses; and the home administration of the controls' testing opens the possibility for family members to influence the answers directly.

Armor expresses amazement that the METCO children revealed as a group more militant and ideological responses than the "control" children, but the differential testing administrations provide a possible explanation. Repeated surveys indicate that young black peers at school are far more likely to be militant and ideological than older parents at home (Campbell and Schuman, 1968; Goldman, 1970); and research in social psychology has shown that such different situational influences can have a sharp effect on group-linked attitudes (Charters and Newcomb, 1952).

On the second point, measuring the groups *before* the treatment, the METCO research also fails. The METCO pupils were measured initially in October 1968, *after* all of them had begun for a month or more their year in the METCO school. Moreover, 45 per cent of the METCO children were not beginning "the treatment" of suburban education, for they had already been in the program for either one or two years.

Finally, studies utilizing achievement tests require well-motivated students who are trying to do their best. We learn from those in attendance at both the first and second test administrations, however, that motivation was apparently not high. And no wonder. The students, METCO and control, had no special incentive for taking the lengthy tests on a holiday in a Boston technical school described by Walberg (1969) as "an old, run-down, ill-cared-for building." This low level of motivation probably accounts for the small turnout for the second test.

e. *Analysis problems.* Even if there were no serious control group and sample problems, numerous data errors place Armor's analysis of the METCO results in serious question. One child was included who apparently did not take the verbal test initially at all; his post-test scores were then treated as a total gain from a base of zero. A sixth (25 of 151) of the junior high students initially scored virtually as high as the achievement test scoring allowed. Thus, this "ceiling effect" made it impossible for their post-test scores to advance, and their performance was treated as showing "no gain." Such problems, together with clerical errors, help explain why such talented children are shown to make such slight achievement gains in Armor's Figures 1 and 2. But given the large and basic control group and sample problems, no purpose is served by a reanalysis of these data that corrects for these errors of analysis and data handling.

Inadequate discussion of the METCO research. The reader is not told enough in Armor's article to evaluate the METCO research fully.

Most of our critical comments are based on information gleaned from a reanalysis of the raw data, the examination of unpublished papers on the research (Archibald, 1967; Walberg, 1969; and Armor and Genova, 1970), and a review of Armor's court testimony concerning the research. The discussion of the METCO work is also inadequate in other ways: (a) Differential statistical standards are employed; (b) attitude differences between METCO schools are not shown; and (c) misleading claims of consistency with other research findings are advanced.

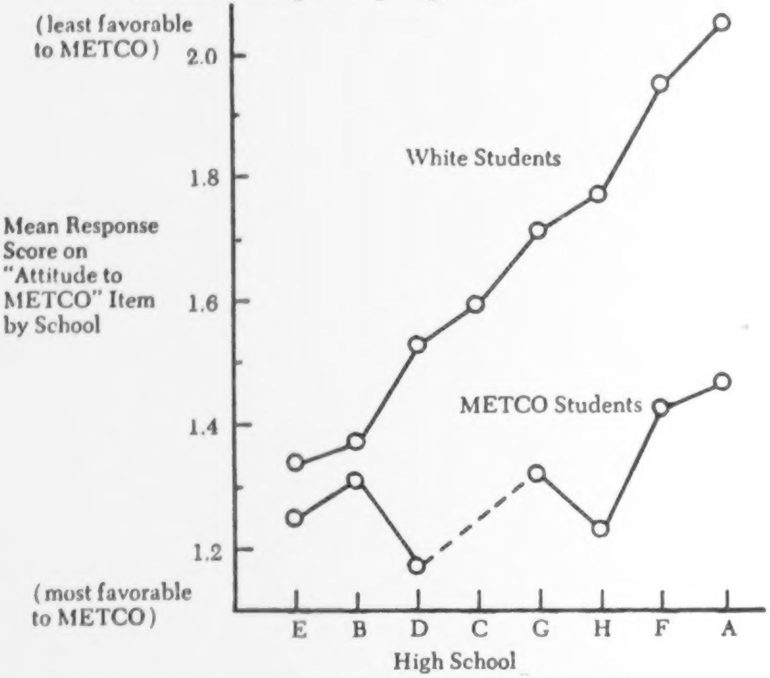
a. *Differential statistical standards.* Rigid standards of statistical significance are uniformly applied to findings that favor school desegregation. Findings of positive effects in other studies that approach statistical significance are summarily dismissed as "not significant." But these standards are relaxed considerably when findings interpreted as negative to school desegregation are discussed. For instance, Figure 3 is provided to show how the grades of METCO's junior and senior high school pupils declined slightly, and this finding is emphasized in the conclusions (Armor, p. 109). Yet there is no significant difference between the METCO and the control groups on changes in grades. Similarly, a slightly greater increase among METCO students in wanting a school with no more than half-white student bodies is emphasized (Armor, pp. 102-103). Though "... the differential change is not statistically significant," Figure 7 is devoted to it. And later in the conclusions, this finding is utilized without qualification as part of the evidence that "bused" black students have become more supportive of "black separatism."

b. *Attitude differences between METCO schools are not shown.* Armor's article assumes that the METCO program consisted of the same "treatment" for all of the children participating in it. Consequently, attitude differences across METCO schools were not shown; nor, as noted earlier, were any variables utilized to take into account what type of educational programs were actually occurring inside the various METCO schools.

Actually, of course, there are as many different METCO programs under way as there are separate METCO schools. But consider the contrasting policy implications of providing only the total results as opposed to school-by-school results. Suppose a particular school program aimed at improving racial attitudes were attempted in eight schools, and that the overall effect was minimal. The policy implication would be to regard the program a disappointment and to consider abandoning it. Suppose further that a meaningful effect had in fact been registered in all but two schools, but that attitudes in these two were so unfavorable that they virtually obscured the favorable attitudes of the other six in the total data. Now the policy implication *from the same data* would be to regard the program as encouraging and to find out how to change the deviant two to make them more like the successful six schools. In short, the variability across schools is a critical consideration in judging a program.

Our Figure 1, from Useem (1971), shows that a situation similar to this existed for the METCO program in 1969. Note that schools F and

FIGURE 1. *Attitudes of METCO and White Students Toward the METCO Program by High School*[1]



[1] Data from METCO students in School C were not available. The Figure is taken from Useem (1971).

A evince by far the most anti-METCO sentiment among both white and black pupils. Note, too, that black attitudes toward METCO are consistently more favorable than those of whites, though there is a positive relationship across schools in the attitudes of the two groups. With such wide differences between METCO schools, how can a simple judgment of success or failure be passed upon the entire program?

c. *Misleading claims of consistency with other research findings are advanced.* Two studies are cited as providing supporting evidence for the METCO results; but their descriptions are so incomplete as to be highly misleading. Useem's (1971, 1972) METCO investigation is given as evidence for how interracial contact in METCO schools leads to worse race relations. Her complete findings, however, point to a different conclusion, and we shall return to these findings shortly. The other citation refers to Armor's earlier reanalysis of the Coleman report data:

> An extensive reanalysis of the Coleman data showed that even without controlling for social class factors, "naturally" integrated (i.e., nonbused) black sixth-grade groups were still one and one-half standard deviations behind white groups in the same schools, compared to a national gap of two standard deviations. This means that, assuming the Coleman data to be correct, the *best* that integration could do would be to move the average black group from the 2nd percentile to

> the 7th percentile (on the *white* scale, where the average white group is at the 50th percentile). (Armor, p. 100)

Such a statement is extremely misleading, and it requires clarification. It appears to assert that there is some upper limit on the possible achievement gains through "busing" of blacks relative to whites. No such assertion is possible. Moreover, the evidence for this claim is based on data from *groups* of children who are in general not bused and for whom there are only Coleman's cross-sectional data. The statement, then, implies a causal relation from cross-sectional data, a practice correctly condemned earlier by Armor. The statement further implies that there is some intrinsic, if unspecified, connection between the gains possible from "busing" and the inferred gains estimated from cross-sectional data.

More misleading still is the use of *group* percentiles. Technically, it may be correct that the average black *group* mean in desegregated sixth grades is only at the 7th percentile when compared with the means of white *groups*. But the obvious misinterpretation that can easily arise is that the average individual black *student* in a desegregated school is only at the 7th percentile compared with the individual white student norms. Such an interpretation is patently *wrong*. Though Armor can argue that his statement is technically accurate, we feel that he has an obligation to inform the lay reader fully so that such a misinterpretation could not occur.

The misleading statement utilizes standard deviations based on group means rather than on individual scores. Group standard deviations are invariably smaller than standard deviations based on the individuals within the groups. Instead of the average black *group* in desegregated sixth grades being at the *7th* percentile of white *group* norms, then, we estimate that the average black *individual* in desegregated sixth grades ranks between the *25th* and *30th* percentiles of white *individual* norms.[9] Indeed, Figure 2 of Armor's article shows that the black senior high students in the METCO research average between the 25th and 43rd percentiles in individual reading achievement.

The achievement effects of "busing" are more complex and positive than reported. Armor concludes that "busing" fails on four of the five standards he alone sets for it. One of these alleged failures concerns the academic achievement of black students. From the selected findings of selected studies, Armor concludes that desegregation research throughout the nation has typically found no statistically significant enhancement of black achievement. Further, he claims that the METCO results support this conclusion. But we have noted how this conclusion was reached through the omission of at least seven further investigations with positive black achievement results and through serious weaknesses in the METCO research.

This is not the place for a complete review of the relevant research literature. But our evaluation of the available evidence points to a more encouraging, if more tentative and complex set of conclusions.

First, the academic achievement of both white and black children is not lowered by the types of racial desegregation so far studied. Second, the achievement of white and especially of black children in desegregated schools is generally higher when some of the following critical conditions are met: equal racial access to the school's resources; *classroom*—not just school—desegregation (McPartland, 1968); the initiation of desegregation in the early grades; interracial staffs;[10] substantial rather than token student desegregation (Jencks and Brown, 1972); the maintenance of or increase in school services and remedial training; and the avoidance of strict ability grouping.

Grading changes before and after desegregation are meaningless if differential grading practices are not considered. "Busing" also fails, according to Armor, because the grade average of the METCO students in junior and senior high schools declined. The average METCO grade decline is slight (—0.12 on a four-point scale), although he described it as "considerable" (Armor, p. 109). Nor is the difference in grade changes between the METCO and control groups statistically significant. Moreover, the greater drop in METCO grades than in control grades may be an artifact of the enormous non-response rate discussed earlier, for the full cross-sectional data show the controls' grades falling as much as those of the METCO children (—0.14 to —0.13).

Black grades also fell after desegregation in Evanston, we are informed in Armor's footnote 4. But we are not informed that the same study shows that white grades also fell and that there were no significant differences "in the frequencies of earned grades within each group" (Hsia, 1971). By contrast, when black pupils left a segregated junior high school in Sacramento in 1964, they soon received higher grades in the desegregated schools and maintained this improvement throughout their junior high years (Morrison and Stivers, 1971). However, none of these results are convincing, since differential grading practices are not controlled.

Shifts in aspirations and "academic self-image" during desegregation are positive in meaning. Armor further contends that "busing" fails because it lowers both the aspirations and academic self-concept of black children. Several qualifications are briefly discussed initially (Armor, pp. 101-102), but when the conclusions are drawn, this METCO "finding" has become unqualifiedly one of the four failures of "busing" (Armor, p. 109).

Actually, the METCO data on the subject are by no means clear. Two of Armor's three relevant Figures (5 and 6), those concerned with occupational aspirations and with "feeling more intelligent than classmates," show no significant change differences between the METCO and "control" groups. And the non-response bias may account for the one significant change difference—in regard to the desire to obtain a bachelor's degree (Figure 4)—since the full cross-sectional samples reveal a similar decline for both groups (—11 per cent to —12 per cent).

Two careful desegregation investigations from Pittsburgh and Evanston, however, *have* found lower black aspirations combined with *better* academic performance. Black ninth graders in Pittsburgh had significantly higher arithmetic achievement and lower educational aspirations in desegregated schools (St. John and Smith, 1969). Similarly, *both black and white pupils* in Evanston's third, fourth, and fifth grades who had previously been in predominantly black schools reported somewhat lower academic self-concept scores after two years in predominantly white schools (Weber, Cook, and Campbell, 1971; Hsia, 1971). And we have noted that Evanston's black and white children made achievement gains during desegregation, though they were not statistically significant (Hsia, 1971). Since this effect occurred for *both* racial groups, these investigators inferred that this "social comparison effect" reflected adaptation to new norms and more realistic conceptions of academic performance.

The key to understanding the apparent paradox of reduced aspirations combined with increased achievement is the well-known psychological principle that achievement motivation and aspiration level are by no means identical. Researchers have repeatedly found that moderate motivational levels are best for learning and achievement (Atkinson, 1964). Some of this motivational research directly concerns black children. Katz (1967), for example, has demonstrated experimentally how unduly high aspirations can doom black students to serious learning difficulties. In his view, desegregation benefits learning among black children by lowering their aspirations to more effective and realistic levels. Veroff and Peele (1969) supported Katz's position in a study of desegregation in a small Michigan city. They found that achievement motivation, as measured by the choice of moderately difficult tasks, significantly increased for black boys after one year in a desegregated elementary school; black girls, however, did not evince the change.

If METCO had drastically curtailed black ambitions to low levels, this would have been a negative result. But METCO reduced these ambitions only slightly, for they remained as high or higher than the ambitions of white students in METCO schools.[11] In short, when desegregation lowers rigidly high aspirations of black students to moderate, effective levels, it should be considered a positive, not a negative effect.

Shifts in racial attitudes during desegregation are exaggerated and interpreted too narrowly. "Busing" fails again, in Armor's view, because he regards his METCO data as indicating that desegregation leads to negative effects for race relations. Once again, these METCO data are tenuous at best. Though much is made of it, the increase among METCO children in their desire to attend schools with at least half-black student bodies proves not to be significantly different from a similar increase among the "control" students (Figure 7). No control data are shown for black students' relations with white students (Figure 10), even though data without control comparisons are otherwise condemned by Armor and a large segment of the "control" group also attended interracial schools and had contact with white students. And as already noted, the differential administration of the third attitude questionnaire in 1970 is a critical factor which probably explains at least part of the difference between the two groups.

But if these supporting data are suspect, Armor's interpretations of them are even more suspect. "Militancy" and heightened "black consciousness and solidarity" are viewed as indicating "bad" race relations, though Armor adds, "It would be a mistake, of course, to view the increased racial solidarity of black students as a *completely* negative finding" (Armor, p. 113, italics added). Similarly, support for "black power" and a preference for a school with a student body that is evenly divided between the races are believed necessarily to involve "black separatism." Even sympathy for the Black Panthers is regarded as indicative of "anti-integration sentiments"; this despite the fact that the Panthers do not support racial segregation and removed Stokely Carmichael as a member because of his insistence on racial separatism.

These interpretations involve a logical contradiction in Armor's argument. He begins his article with the famous "hearts and minds" quotation of the 1954 Supreme Court ruling against *de jure* racial segregation of the public schools; and he employs it as evidence of the powerful influence of social science upon "the integration policy model." Yet the Supreme Court was maintaining that segregation led to black self-hate. Now when he interprets his data as showing that METCO "busing" leads to racial pride, militancy, and a desire to be among blacks as well as whites, Armor concludes that "the integration policy model" is proven wrong and that "busing" causes bad race relations.

The article admits that the METCO children are still supportive of the program, but emphasizes the trend toward "militancy." No consideration is given to the effects of the differential administration of the third-wave questionnaires; nor is any given to the possible effects of the study's having begun just after the 1968 assassination of Dr. Martin Luther King, Jr., a tragic event with wide repercussions for black/white interaction. Finally, the attitude results, like the achievement results, must be reinterpreted in the light of our discovery that much of the "control" group attends substantially desegregated schools. It could be, then, that the extreme tokenism of the METCO programs influenced these attitude results. They cannot be related to "busing" and desegregation, given the composition of the "control" group.

Nonetheless, Armor views these findings as a challenge to contact theory. To buttress this contention, he selectively cites a lone finding out of context from Useem's (1971, 1972) 1969 study of white racial attitudes in METCO schools.

> Nonetheless, although the evidence is not complete, what we have indicates that the white students themselves were negatively affected by the contact. . . . [t]hose students who had direct classroom contact with bused black students showed *less* support for the busing program than

> those without direct contact. In fact, the kind of students who were generally the most supportive—the middle-class, high-achieving students—showed the largest decline in support as a result of contact with bused black students. This finding is based on cross-sectional data and does not indicate a change over time, but it is suggestive of the possibility that a general polarization has occurred for both racial groups. (Armor, pp. 103-104)

When drawing conclusions, however, he forgets his own caution against drawing causal inferences and flatly states that "white student attitudes in the receiving schools also tended *to become* less favorable to black students . . ." (Armor, p. 112, italics added).

The simple correlation between increased classroom contact and more negative feelings toward METCO among white students is statistically significant; but Armor fails to report that the relationship is no longer significant once such variables as sex, socio-economic status, and academic standing are taken into account. Moreover, this effect is limited to upper-status students of high ability who remain favorable to the program but who have their initially unrealistic expectations of blacks modified.

There is also a failure to report other relevant findings from Useem's work. For example, she found a statistically significant positive relationship between favorable white attitudes toward METCO and earlier equal status interracial contact in elementary school, summer camp, etc.; and this strong relationship remained significant after full controls were applied. Useem also found a relationship ($p<.08$) between support for METCO and interracial contact in extracurricular activities. Moreover, she found that having a METCO friend is strongly linked to support of METCO, and is best predicted by equal status contact with blacks as a child and with METCO students in class and school activities.[12]

The evidence that school desegregation "channels" blacks into greater future opportunities is stronger than presented. The one "success" of "busing," Armor admits, is that METCO appears to "channel" its students into colleges at higher rates than control students presumably from the same families. But this finding is couched with many qualifications that are conspicuously absent from his negative conclusions. Furthermore, his article actually understates METCO's success in this regard and fails to cite recent research that indicates that it may well be an important effect of interracial education in general.

Armor's article shows in its Figure 11 that 78 per cent of the METCO graduating class of 1970 entered four-year colleges, compared to only 44 per cent of the controls. By the fall of 1971, the percentages were 66 per cent and 44 per cent; and by the spring of 1971, 56 per cent and 38 per cent. (For universities, the spring 1971 figures were even more impressive, with 43 per cent of the METCO graduates and only 12 per cent of the controls enrolled.) Similarly, positive results are cited from another special program (Perry, 1972).

But the article also implies that the METCO drop-out rate from college is excessively high, suggesting that the program pushes into college students who do not belong there. This point is answered as soon as one compares the METCO figures with other data on college attendance. For 1969 and 1970, the percentages of the *total* graduating classes of the METCO high schools going on to four-year colleges were 61 per cent and 62 per cent—all well below the 1969 and 1970 METCO figures of 77 per cent and 78 per cent (Useem, 1971).[13] Moreover, the 84 per cent college *retention* rate of the 1970 METCO graduates who entered the second year of the four-year colleges is *not* abnormally low. In fact, it is slightly above the 78 per cent national retention rate for white students in four-year colleges (Astin, 1972).

Nor was the 1970 METCO graduating class unusual. Robert Hayden, the director of METCO, kindly supplied us with data on the 32 METCO graduates of 1969. Twenty-eight (88 per cent) entered college in the fall of 1969, while four began full-time employment. Three years later, attempts were made to contact the entire group, and 22 of the 28 college-attenders were reached. One was in the Army, and five had left college. Sixteen (73 per cent), however, were still enrolled in college.

Yet Armor belittles such concrete results. He emphasizes that such findings are tentative, based on small samples, and may indicate that the future benefits of biracial schooling are limited to the college-bound. The importance of all three of these cautions is reduced, however, by a major research effort that goes unmentioned. Robert Crain (1970), using a 1966 survey of 1,624 adult blacks in the urban North, focused upon the occupational and income outcomes of desegregated education for high school graduates.[14] Crain concludes:

> American Negroes who attend integrated public schools have better jobs and higher incomes throughout at least the next three decades of their life. The differences in income cannot be accounted for by the higher educational attainment of alumni of integrated schools, or by the higher differences in social background. The most significant effect of integrated schools is probably not "educational." It is probably more important that Negroes who attend integrated schools will have more contact with whites as adults, and tend to have more trust in whites than do Negroes from segregated schools. This in turn partially overcomes a crucial barrier to equal opportunity—the fact that information about employment opportunities is spread through types of informal social contacts to which few Negroes have access.

The firm policy conclusion against "mandatory busing" is not substantiated by the evidence presented. For the many reasons discussed above, the evidence does not justify Armor's unqualified conclusion: "The available evidence on busing, then, seems to lead to two clear policy conclusions. One is that mandatory busing for purposes of improving student achievement and interracial harmony is not effective and should not be adopted at this time" (Armor, p. 116). Interestingly, this conclusion was added to the final version after considerable publicity concerning Armor s paper had been generated by its repeated leaks to the mass media. An earlier draft had concluded only that "the data may fail to support mandatory busing as it is currently justified . . ."

Armor also concludes that "voluntary busing" should continue for those who still believe in it and for the sake of social science research. Yet he never demonstrated, nor do we detect it when reviewing the evidence, that "mandatory" and "voluntary" desegregation lead to different effects. "Mandatory busing" is condemned out of hand even though his article rests most heavily on a voluntary program's effects, and rests entirely, except for Berkeley, upon token programs with small numbers and percentages of black children, while most "mandatory" programs involve larger numbers and percentages of black children in Southern cities excluded from consideration.

In a real sense, Armor's article does not concern itself with "busing" at all, save for its title and its conclusions. It does not provide us with direct evidence on the "busing" of school children for racial desegregation, for it never treats "busing" as an independent variable. Rather, his article is an attack upon the racial desegregation of public schools that often, but not always, involves "busing." Large numbers of the children in the few studies cited by Armor attend desegregated schools without "busing." And we have noted that in his own METCO study many of his so-called "controls," who were supposed to be "unbused" and segregated, were in fact "bused" and desegregated. Furthermore, a check on his METCO sample finds that a substantial number were *not* bused. Armor was apparently aware of these problems, for he admitted in his court testimony for segregation in Detroit that "a more accurate title would be 'The Effects of Induced School Integration.' "

To our knowledge, there is actually no evidence whatsoever that "busing" for desegregation harms children. This is fortunate, since over 40 per cent of all school children in the United States are "bused" daily (though only three per cent are "bused" for puposes of achieving racial desegregation; Metropolitan Applied Research Center, 1972). Only one of the investigations mentioned in Armor's article actually utilized "busing" as an independent variable. It found, though this was also omitted, that black pupils in Evanston who were bused to desegregated schools attained significantly higher test score gains than those who either remained in or walked to desegregated schools (Hsia, 1971). This result may be an artifact of selection, but it at least indicates that "busing" *per se* did not impair achievement.

IV

The article's basic assumptions about racial change are unjustified. To this point, our critique has answered Armor's argument within the narrow confines of his view of the process of racial desegregation of the public schools. But here we wish to break out of these confines and to challenge the basic assumptions about racial change that undergird his entire article. Armor's thesis is predicated on viewing school desegregation as a technical matter, an inconvenient intervention whose merit must be judged solely by how well *black* children manage to adapt to it. Blacks are once again the "object" whose reactions should determine "what is good for them." The conditions faced by black children go unmeasured and ignored, and the whole context of American race relations is conveniently forgotten. All interracial contact is assumed to constitute "integration." No mention whatsoever is made of white racism, individual and institutional, which the Kerner Commission maintained was at the root of the problem (National Advisory Commission on Civil Disorders, 1968). Nor is there any discussion of the strong argument that genuine integration is necessary primarily for its potential effects on *white* Americans and *their* racial attitudes.

Instead, the whole issue is portrayed as the creation of "liberal educators" who are "so intent on selling integration to reluctant white communities that they risk the danger of ignoring the opinion of the black community" (Armor, p. 115). Forgotten is the fact that the issue was the creation of black America, from Charles Hamilton Houston to Roy Wilkins, and that it has been continuously opposed by white America with every conceivable means.

Data from the limited METCO sample are generalized to the whole black community (Armor, p. 113). The anti-busing resolution of the National Black Political Convention held in Gary, Indiana, in March 1972 is emphasized, but the paradoxical fact that the same Convention also passed a strong "pro-busing" resolution is not cited. While it is acknowledged that "many black leaders favor school integration . . ." and that "the *majority* of blacks *may still* endorse the *concept* of integration . . ." (Armor, pp. 112, 115, italics added), the full range of support for school integration (not merely desegregation) in the black community is never revealed. "Would you like to see the children in your family go to school with white children or not?" When asked this question at the time of the METCO research in 1969, 78 per cent of a national sample of black Americans (*up* from 70 per cent three years before) chose "go with whites," as opposed to 9 per cent "not with whites" and 14 per cent "unsure" (Goldman, 1970).[15] Thus not just a majority but an overwhelming portion of black America still opts for school integration. If any further evidence were needed, the immediate and hostile public reactions of many blacks to the initial newspaper stories concerning Armor's paper should have supplied it. This is not to deny that there are strong doubts among blacks, especially the young, as to whether white America will ever allow genuine integration to become the national norm, doubts that are only reinforced by the assumptions upon which Armor's article is based.

Armor asserts that the burden must fall upon those who support school integration to prove that it works. Given America's unhappy racial history, we believe that the burden of proof rests with those who wish to maintain racial segregation. But actually such contentions miss the point. The courts' interpretation of the 14th Amendment of the United States Constitution, and not social scientists' opinions about black responses, ultimately governs the racial desegregation of the public schools and court-ordered transportation which may be needed to achieve it. This fundamental fact was dramatically demonstrated by the judicial reaction to Armor's deposition in the Detroit school case, a deposition based on an earlier draft of "The Evidence on Busing." On June 12, 1972, U.S. District Court Judge Stephen H. Roth ruled the deposition inadmissible as evidence on the grounds of irrelevancy. The deposition, in Judge Roth's view, represented "a new rationale for a return to the discredited 'separate but equal' policy . . ."

FOOTNOTES

[1] This is true from the early statements on the desegregation process by Clark (1953), Williams and Ryan (1954), Johnson (1954), and others (summarized in Coleman, 1960) to more recent statements by Katz (1964) and Pettigrew (1969, 1971).

[2] Matthai (1968) describes the White Plains (1967) research as follows: "The small numbers of Negro students tested (33 desegregated students, 36 from previous years); the lack of explicitness about comparability of the groups under study and the rationale of sample selection; the occasionally contradictory figures and tables; the lack of significance tests; the selection of only one grade level for study (plus a truncated comparison of another grade level); and the almost impenetrable prose of the research report make this study utterly equivocal."

[3] Grades two and four were excluded because of problems of sample drop-out. Earlier work showed somewhat greater gains for the desegregated youngsters in the second grade and for the segregated youngsters in the fourth grade (Mahan, 1968), so the omission of these two grades should not bias the results of this new analysis (Thomas Mahan, personal communication).

[4] More recently, a study has been released by the Center for Urban Education concerning 25 black first, second, and third graders bused under Project Concern from Bridgeport to Westport, Connecticut. Though the sample size renders its findings tentative, it found marked academic improvement for the "bused" children during one-and-a-half years when compared with similar unbused children remaining in the segregated sending school in Bridgeport. The study also found no ill effects among the desegregated white children (Heller *et al.*, 1972).

[5] We wish to thank Robert Hayden of METCO, the Boston School System, and the families of the children contacted for their helpful cooperation in securing these data.

[6] We are here following the standard practice of defining a segregated school as one with a predominantly black student body. Had we employed a majority-white definition for a desegregated school, the "control" percentage attending desegregated would be 53 per cent (29/55) instead of 62 per cent (34/55). Small numbers of Chinese-American and Spanish-speaking students in a few of the schools explain the minor difference.

[7] Our projected sample sizes conservatively assume a standard deviation of the junior high gain scores of one grade level.

[8] Unfortunately for the discerning reader, Armor failed to mention these losses of elementary subjects in the one footnote he devotes to the subject. We obtained them from Walberg (1969).

[9] Using the Coleman report data, the standard deviation for groups of white students in desegregated schools in the Metropolitan North is only about 40 per cent as large as the standard deviation of the white individual scores; or, on Coleman's verbal test, roughly four points where the standard deviation of the individual whites is 10 points (Coleman *et al.*, 1966). Since Armor finds that the mean for white groups in desegregated schools is roughly one-and-a-half group mean standard deviations larger than that for black groups in desegregated schools, we estimate that the average black child is roughly six points (1.5 x 4

points) behind the average white child. Translating this into individual percentiles and assuming that the average white in desegregated schools is at the 50th percentile, we arrive at our estimate that the average black pupil in desegregated schools is between the 25th and 30th percentiles.

[10] Bailey (1970) has also shown that high school "disruptions" and racial tensions are far less likely to occur when the black staff percentage is equal to or greater than the black student percentage.

[11] Useem (1971) studied white tenth graders' aspirations and attitudes in eight out of the nine secondary schools participating in the METCO program during 1968-69. She found white aspirations just equal to or below those reported for blacks in the same schools. Thus, 74 per cent of the white students wanted to be above the middle of the class academically compared to about 80 per cent of the black students; and 26 per cent of the whites aspired to a professional or graduate school compared to 35 per cent of the blacks.

[12] In his Detroit segregation testimony, Armor stated that he omitted these positive findings of contact because they were voluntary and therefore could have been caused by self-selection. But classrooms at the high school level often involve selection too. Besides, 72 per cent of Useem's white students who had contact with METCO students in school activities had it in athletics. Armor's argument requires us to believe that tolerant white students would go out for football primarily to have contact with the few black players on the team.

[13] Data from one METCO high school was unobtainable for 1970, but the similarity of the percentages for the two years suggests that this does not introduce a serious bias.

[14] From these same data, Crain (1971) also finds "that those who attended integrated schools are more likely to have graduated from high school, are more likely to have attended college, and score higher on a verbal test than those who attended northern segregated schools. It seems likely that the higher achievement of Negroes in integrated schools can be attributed partly to differences in the character of their classmates, irrespective of race. In addition, however, there is evidence that attending integrated schools has an important impact in establishing social and psychological preconditions for achievement."

[15] Armor's data on black attitudes toward "busing" in his footnote 11 are outdated. By March 1972, blacks favored "busing" for integration by 54 per cent to 34 per cent (Harris, 1972).

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The Double Double Standard: a Reply

DAVID J. ARMOR

THOMAS PETTIGREW and his associates have missed the essential point of my study. As a consequence, their comments shed little light on the current public controversy over busing. Indeed, their critique further promulgates the ambiguities and confusions that have prevailed in the field of race relations since Myrdal's *An American Dilemma.*

The essential requirement for sound reasoning in this matter is observance of the distinction among the findings of science, the results of policy, and the dictates of law or morality. I studied the results of existing policies of induced school integration (all of which used, of necessity, varying amounts of busing). I was *not* studying the scientific issue of what *might* happen under various conditions (other than those in effect in the programs studied), nor the legal question of whether it *should* have happened according to various constitutional interpretations. My task was far simpler. I asked only the question: What *has* happened? My critics have confused the *has* with the *might* and the *should.* This confusion is further compounded by tneir application of two double standards for the evaluation and use of the evidence on busing.

I am accused of having too severe standards and unrealistic expectations about the benefits of induced school integration (which I will hereafter abbreviate as "busing"). But *I* did not formulate these standards and expectations. They come from the programs themselves, buttressed by several noteworthy studies, particularly the Coleman report and the 1967 report of the U.S. Commission on Civil Rights. I do not doubt that existing busing programs are also based upon moral and legal principles, especially the 1954 Supreme Court doctrine that "separate is unequal." But even in the 1954 decision social science findings are cited as "authority" and hence become entangled with constitutional issues.

One expectation stands out above all others: Integrated education will enhance the academic achievement of minority groups, and thereby close (or at least substantially reduce) the achievement gap. There is good reason for the prominence of this belief. The Coleman study revealed a large and consistent achievement gap between white students and most minority groups (with the notable exception of Oriental students). The gap between black and white students averages about 33 percentile points. This means that for any black child and white child drawn at random from the general population, we can expect the black child's scores to average about 33 percentile points below the white child's. This achievement gap became the main argument against segregated education and the yardstick by which to measure progress. It is unlikely that de facto segregated education would ever have become such a major issue, or that so many communities would have voluntarily initiated busing programs, without this evidence.

This is also the central issue in the critique. The critique makes the incredible claim that looking at black and white achievement differentials is not appropriate, since *both* groups may gain under integration. Not only is there little evidence in support of this claim, but even if it were true there is no way we could conclude from it that integration would solve the educational deprivation of minorities. Would we solve the economic problems of minorities if we raised *everyone's* annual salary by $3,500? Of course not. Such a gain was in fact registered by both whites and non-whites between the 1960 and the 1970 census, but there has been no lessening of the clamor over economic inequality. But money at least has some meaning in absolute terms; this is not the case for academic achievement as measured by testing. As any educational specialist knows, there is no "zero-point" on an achievement test, and progress is always measured on a *relative* basis (i.e., a student's progress relative to a national or local norm). Thus if the black/white achievement gap does not change, there is no way one could conclude that busing is beneficial for minority groups.

I am accused of selecting only "negative" studies and leaving out seven other adequately-designed studies that were more "positive." In fact, I looked at all the studies that I could obtain at the time. Their results were so consistent that I was quite confident about my conclusions. I have now looked at these seven reports (only four of which meet the technical requirements for an adequate study) and have no reason to change my conclusions; nor do I see much evidence to support the authors' optimism.

The only way to settle this issue is to look at some of the findings. I have selected a number of studies that were not in my original review, including some that are cited by Pettigrew and his colleagues. The only criteria I used for my choices were the comprehensiveness of the data and the presence of some of the conditions my critics claim are important for achievement gains (i.e., two-way busing, classroom integration, duration, etc.). I will focus on reading achievement, since this is about the only academic skill which is measured in all of the studies.

The first example is drawn from the Evanston study, which in my opinion is technically one of the best. Also, it fulfills most of the important conditions cited in the critique: A sizable proportion of the students were black (about 20 per cent); almost all classrooms were racially balanced; faculties were integrated (about 10 per cent black); and the duration of the integration experience was three years. The performance of the fourth-grade cohort is typical:

TABLE 1. *Reading Achievement in Evanston*[1]

RACE	BEFORE INTEGRATION (GRADE 4—1967)	AFTER INTEGRATION (GRADE 7—1970)
White (N=185)	253	278
Black (N=606)	237	253
Gap	**16**	**25**

[1] Adapted from Jayjia Hsia, *Integration in Evanston* (Evanston: Educational Testing Service, 1971), Table 11. Scores are based on the STEP reading test; the standard deviation is approximately 15.

The black/white gap is 16 points before integration, or just about one standard deviation (almost identical to Coleman's finding for the sixth grade nationally). After three years of integration the gap has increased to 25 points, and we can see that the *black students in grade seven are performing at the same level that the white students were at in the fourth grade.* In other words, in the seventh grade the black children are three years behind white children in reading achievement. Similar results were found for cohorts starting at grades one and five and for performance on arithmetic achievement tests. We do not know whether the achievement of *both* groups might have been enhanced; but what difference would that make in terms of the possible harmful effects on the black children in Evanston who are forced to compete for academic rewards at so large a disadvantage?

The Berkeley data also afford a good example, for the Berkeley program employed two-way busing (whites to previously majority-black schools and vice versa) and integrated faculties and classrooms. Although the study was cross-sectional, data were presented over a four-year period for six grade levels; thus it is possible to construct a first-grade cohort and follow that same grade (if not exactly the same students) through two years of integration experience:

TABLE 2. *Reading Achievement in Berkeley*[1]

RACE	BEFORE INTEGRATION (GRADE 1—1967)	ONE YEAR OF INTEGRATION (GRADE 2—1968)	TWO YEARS OF INTEGRATION (GRADE 3—1969)
White (N=500+)	1.9	3.1	4.1
Black (N=400+)	1.6	2.2	2.8
Gap	**.3**	**.9**	**1.3**

[1] Adapted from Arthur D. Dambacker, "Comparison of Achievement Test Scores Made by Berkeley Elementary Students Pre and Post Integration" (unpublished report, Berkeley Unified School District, 1971), Table 7. Scores are grade equivalents based on the same test the Stanford Achievement Test (administered in May each year).

We can make inferences about these data if the student turnover rate is not too high, which is a reasonable assumption. In each year the gap increases, so that after two years of integration the gap is more than one grade level. Again, it is clear that integration has not closed the achievement gap in Berkeley, and the black students are competing at a large disadvantage.

Sacramento is one of the integration programs cited by the authors as indicating positive effects of integration. While it is true that there are some positive results reported for *some* tests, the black/white gap does not change. The following data are for the first-grade cohort:

TABLE 3. *Reading Achievement in Sacramento*[1]

GROUP	BEFORE INTEGRATION (MAY 1966)	AFTER INTEGRATION (MAY 1967)	AFTER INTEGRATION (MAY 1968)
Majority (N=221)	2.1	3.2	4.1
Minority (N=35)	1.6	2.0	2.9
Gap	**.5**	**1.2**	**1.2**

[1] Adapted from Albert J. Sessarego. "A Summary of the Assessments of the District's Integration Programs, 1964-71" (unpublished report, Sacramento City Unified School District, 1971). Scores are grade equivalents based upon the Stanford Reading Test. Minority group includes both black and Mexican-American students.

The resemblances to the Berkeley data are striking. Again we see that while the gap has not widened, it exceeds a whole grade level by the end of the third grade. Sacramento has also reported some interesting data which allow comparison of segregated minority students receiving intensive compensatory services with integrated minority students. Averaging over the Stanford Reading Test in grades one to six, we find that the compensated segregated students gained about 1.1 years, while the integrated students gained about 1.0 years. In other words, it is possible that the slight improvements Sacramento observed in achievement of integrated students compared to *non-compensated* segregated students (for some grades on some tests) are due to differences in the services of instruction received at the integrated schools and not to integration per se. While Coleman found that school facilities and staff were not major contributors to achievement differentials, he did not say that they had *no* effect whatsoever.

Another "positive" example cited by the critique is a study of integration via school "pairing" in New York City in 1965. This study is particularly interesting in that an attempt is made to compare integrated students with both black and white segregated students. While the study gives no indication about classroom or faculty integration (which are important for educational benefits, according to my critics), and while the paired school is not majority-white (another supposedly crucial condition), it does afford us a look at the black/white gap in reading achievement for a fifth-grade cohort. As can clearly be seen in Table 4, for the integrated students the achievement gap is large (starting at almost three grade levels) and increases (to almost three and one-half grade levels) after one year of integration. The "positive" result in this study is that the integrated

TABLE 4. *Reading Achievement in New York*[1]

SCHOOL	RACE	BEFORE INTEGRATION (APRIL 1965)	AFTER INTEGRATION (MAY 1966)	GAIN
Integrated, paired school	White (N=30)	6.8	8.5	1.7
	Black (N=32)	4.0	5.1	1.1
	Gap	**2.8**	**3.4**	
Segregated schools	White (N=57)	5.7	7.2	1.5
	Black (N=80)	3.5	4.4	.9
	Gap	**2.2**	**2.8**	

[1] Adapted from I. W. Stone, *The Effects of One School Pairing on Pupil Achievement* . . . (unpublished Ph.D. Thesis, New York University, 1968), Tables 18 and 20. Scores are grade equivalents on the Metropolitan Achievement Reading Test.

black students gained 1.1 grades (or 11 months) while the segregated black students gained .9 (or nine months). It does not seem to me that this difference provides much ground for optimism, particularly since the segregated white students also gained about two months less than the integrated white students. That is, the slight difference we observe might be due to differences in instruction content or style and not due to the effect of integration.

The argument of Pettigrew and his colleagues that perhaps white students also gain in achievement from the integration experience per se demands close scrutiny. While it makes sense to argue that black students might gain by being in a classroom environment with higher-achieving white students (the so-called "peer" effect prominent in the Coleman study), it makes no sense at all to argue that white students will gain by being in a classroom environment with lower-achieving black students. What mechanism could possibly be operating that produces *opposite* peer effects for the two groups? It seems to me that my critics' reasoning is getting fuzzy here.

But this is not the crucial issue anyway. One of the main points of my study was to show that black achievement is not being helped in any significant way by busing, and that therefore we have to raise the possibility of harmful psychological effects due to the achievement gap. The small gain of two months for the paired black students in New York is little consolation for their being placed in an environment where they must compete for grades with students *three years ahead* of them in academic growth. The authors completely ignore this issue throughout their critique.

The critique cites another, more recent study of Project Concern (Hartford and New Haven) that shows more positive results. I originally described the Project Concern studies as showing "mixed" results. The new study does not change my view; in fact, it bears great similarity to the other studies presented here. Like the New York study, it presents results for both races in both integrated and segregated environments. It is a particularly good example in that the bused pupils received a variety of compensatory services (such as minority teachers and aids recruited from the sending school). The results for the second grade are typical:

TABLE 5. *Reading Achievement in Project Concern*[1]

SCHOOL	RACE	BEFORE INTEGRATION (1971)	AFTER INTEGRATION (1972)	GAIN
Integrated school	White (N=22)	3.4	4.7	1.3
	Black (N=9)	2.1	2.9	.8
	Gap	1.3	1.8	
Segregated schools	White (N=20)	3.9	5.2	1.3
	Black (N=16)	1.8*	2.4*	.6*
	Gap	2.1	2.8	

[1] Adapted from Barbara R. Heller, *et al.*, "Project Concern, Westport, Connecticut" (New York: Center for Urban Education, 1972), Table 3. Scores are grade equivalents on the Metropolitan Achievement Reading Test. The asterisks indicate that the scores for the segregated black students have been adjusted to reflect a shorter testing period.

Again, we can see that the achievement gap increases for the integrated students, starting out at 13 months and ending at almost two years. We have very much the same situation as in the New York pairing study; the integrated black students gain slightly more than the segregated black students (two months), but the achievement differential is still large and increases over the year. Notice, however, that in this case the segregated white students gain as much as the integrated white students.

My critics cite other studies not presented here. As I have already said, three of them (Rochester, Goldsboro, N. C., and Newark) did not qualify according to my criteria for an adequate study; they did not use the same achievement tests both before and after integration. The Philadelphia study is of limited utility since it dealt only with black students with very high I.Q.'s. The Buffalo study showed mixed results, with one grade showing greater gains for integrated, one grade showing greater gains for segregated, and a third grade showing a small (two months) gain for integrated black students. But in all three grades the white integrated students showed even greater gains, indicating the same increasing achievement gap seen in the other studies.

In view of all of these studies, I can see no reason to change my conclusion that "to date there is no published report of *any* strictly educational reform which has been proven substantially to affect academic achievement; school integration programs are no exception." It was my purpose to show that existing programs have not demonstrated a consistent and important effect on various expected benefits (especially achievement). It was not my intention to *prove* that achievement *could not* be affected, only to show that it *has not* been affected by *existing* programs. Therefore, my critics' argument that the programs I looked at did not fulfill the proper conditions for integration is beside the point. But I will go further than that:

They have presented no convincing evidence that any programs—even those fulfilling their conditions—are having an important effect. There is no clear evidence in the studies mentioned that they fulfilled their conditions, nor is there *any* evidence in these studies—regardless of the conditions—that school integration will close the achievement gap by "approximately a fourth." Of course, it is still true that, under some conditions, integration *might* have an effect. But those who believe this premise will have to produce far better evidence than is currently available.

THE methodological critique of the Boston METCO study is equally irrelevant to my conclusions and recommendations. I would never have made policy statements based on the METCO research without seeing a considerable amount of supporting evidence. I think the reader can see from what has been presented that there is, indeed, a great deal of corroboration. Methodological critiques are always liable to a common fallacy: The existence of technical weaknesses in a study does not prove the converse of its findings. I believe in the METCO findings because they were consistent with many other studies, not because the METCO research was infallible. I am certainly cognizant of some of the limitations of the METCO research pointed out by the critique. Any single social science study could be given a similar treatment. Research conditions in policy evaluation studies are seldom ideal; this is why a social scientist must look for consistency across many studies before coming to any conclusions.

I do not agree with all of the criticisms of the METCO study made by Pettigrew and his associates. In particular, I take issue with their statement that many of the METCO control group students attended integrated schools and therefore were not a proper comparison group. Our control groups were screened for attendance at Boston public schools in the black community, most of which are predominantly black (particularly the elementary schools). Moreover, even those few control group students whose neighborhood school is majority-white still provide a proper comparison, not only because the proportions of minority and lower-class white students are higher in these schools, but also because the Boston schools are presumed unable to provide the kind of quality education found in middle-class suburban schools. After all, this is the whole rationale behind METCO and similar programs, and it must be the belief of many black parents who participate in METCO even though their children could go to majority-white neighborhood schools in Boston.

But the data presented in Table 2 of the critique are misleading in other respects. First, the authors did not use the complete METCO research records to identify schools attended by the control sample; instead, they tried to track down students using incomplete listings of students in a Boston public school register. Not surprisingly, then, they have no data on many of the control students—particularly those in the critical elementary grades. Second, it is not stressed that many of the secondary school control students were in transitional neighborhood schools with large and growing proportions of minority students. For example, of the 10 senior high students listed as integrated, four attended a "border-area" high school with an increasing minority enrollment of 27 per cent in 1968 and 34 per cent in 1969; another attended a high school whose minority enrollment increased from 42 to 64 per cent during these two years; and two others attended a school with a 43 per cent minority enrollment.

I undertook a complete examination of the original research records using questionnaires filled out by METCO parents in 1970 just prior to the second year of the research. Of the 36 (out of 41) elementary control students for whom there were reliable data, only 13 can be identified as attending predominantly white schools. Of the 23 students attending majority-black schools, only five attended schools with a substantial proportion of white students (all of whom were in one school whose minority enrollment increased from 53 per cent in 1968 to 64 per cent in 1969). In other words, in the elementary grades—which are, according to the critique, the more crucial years for achievement changes—complete records indicate that nearly two thirds of the control students attended segregated schools.

What is especially misleading (if not irresponsible) about all this is the authors' use of their incomplete data to conclude that it "renders [my] METCO research of no scientific interest in the study of busing and school desegregation." The clear implication here is that the control group students who went to predominantly white schools might have made large achievement gains which overshadowed lesser gains made by control group students in segregated schools. This would, in turn, make the control group gains spuriously high, perhaps even to the point of masking gains made by METCO students. But we do not have to engage in a lot of verbiage and speculation about this; we can examine the relevant elementary data directly:

TABLE 6. *Reading Achievement Gains for METCO and Control Students in the Elementary Grades*[1]

GROUP	GRADES 3 AND 4	GRADES 5 AND 6
Control students in segregated schools (N's=5 and 10)	.2	.8
Full control sample in original study (N's=14 and 27)	.3	.7
METCO as reported in original study (N's=55 and 59)	.4	.5

[1] All figures are achievement gains in grade equivalents. For the fifth and sixth grade group, the five students attending the 53 per cent minority school have been excluded for the sake of purity; if they are included, the average gain for the controls in segregated schools actually drops to .7 years.

The data show clearly that the segregated control students do not differ in any important and consistent way from the full control sample (or the METCO sample, for that matter). A similar result also occurred for the junior high students; the high school student sample was too small to make any certain conclusion. What this means, then, is that *my original conclusion—that METCO achievement gains are not consistently larger than the control group—also holds when the control group consists only of those students attending inner-city segregated schools.* As has been so often the case throughout this discussion, when rhetoric is replaced by hard, objective data, there does not appear to be very much of substance in my critics' arguments.

THE other major finding with which the critique finds fault is that race relations seem to worsen as a result of induced school integration. Pettigrew and his colleagues seem to be somewhat ambivalent on this point. On the one hand, they criticize my conclusion on methodological grounds, such as the fact that the third-wave questionnaire was given in the white school for the METCO students and at home for the control students. (They ignore the fact that the second wave—which was given under the same conditions as the first wave—already revealed the trend of increased separatism among METCO students.) This would make one think they believe that contact does not increase racial prejudice and hostility. But at the same time they argue that the various indicators I used actually reflect "positive" changes in black self-respect—and therefore do not run counter to the expectations fostered by the integration policy model. Let me take up these two different perspectives in order.

My conclusions on race relations, like those on achievement, were not based only on METCO data. There was support from both the Useem and Riverside studies; but more important, an entirely distinct study of school integration, using the identical separatism index that was employed in the METCO research, gave strong supporting evidence. This study was a cross-sectional evaluation of "A Better Chance" (ABC), a program that places talented black high school students in white prep schools. Its data were not ready in time for use in my original article, but I can report the relevant figures now:

TABLE 7. *Black Separatism in the ABC Program*[1]

GRADE	BLACK ABC PREP SCHOOL STUDENTS	BLACK SEGREGATED SCHOOL STUDENTS	WHITE PREP SCHOOL STUDENTS
Tenth graders (N=135, 130, 134)	1.4	1.3	1.1
Twelfth graders (N=125, 137, 103)	1.7	1.0	1.0

[1] Adapted from George Perry. Scores are from a separatism index ranging from 0 to 4, where 4 means most separatist. The differences between the black ABC and public school students is not significant in the tenth grade, but is significant at beyond the .001 level for the twelfth graders. The vast majority of black ABC students joined the program in the tenth grade.

We see that the twelfth-grade ABC students (most of whom started in the tenth grade) score 1.7 on the index while their tenth-grade counterparts score 1.4. The black control groups (almost all of whom attend predominantly black schools) actually show the *opposite* trend from 1.3 at the tenth grade to 1.0 at the twelfth grade. The data are cross-sectional (that is, the twelfth graders are not the same group as the tenth graders), so we cannot claim a causal confirmation from this study alone. Nonetheless, the ABC tenth and twelfth graders are very similar in most important respects, and the public school control sample consists of black students matched with the ABC students on important characteristics such as ability and family background. Therefore, given the identical findings in the METCO research, I must conclude that there is a strong likelihood that induced school integration enhances separatist ideology as measured by my index.

But is this convergence invalidated by technical weaknesses in the METCO study? The critique is correct in pointing out that the attitude questionnaires were given to the METCO and control students under different conditions in the second year of the study. It also calls attention to the fact that a substantial portion of the control students at the junior and senior high levels (the only levels to take the attitude tests) attended majority-white schools. But the critique fails to note that this "weakness" of the original study can actually be used to further test contact theory by comparing integrated control group students with segregated control group students—both groups having filled out questionnaires under identical conditions:

TABLE 8. *Black Separatism Gains for METCO and Control Students in the Secondary Grades*[1]

	CONTROL STUDENTS IN MAJORITY-BLACK SCHOOLS	CONTROL STUDENTS IN MAJORITY-WHITE SCHOOLS	METCO STUDENTS
Gain	−.1	.3	.4
N	(17)	(16)	(135)

[1] Gain scores for the separatism index reported in the original study for a two-year period. The negative change means that separatist attitudes declined.

In my original study, I reported an over-all gain for the control group of .1. It can now be seen that the slight increase in separatism for the control group was actually due to the subgroup of students in inner-city integrated schools; their gain of .3 is almost as large as the .4 gain recorded for the METCO students. The segregated black students actually *declined* in their separatism scores—much as would be predicted by the ABC data presented earlier. Whatever interpretation one wishes to apply to these results, it seems clear that the METCO finding reported in the original study is not simply an artifact of questionnaire administration or of a faulty control group.

The available evidence supports the conclusion that induced school integration, by enhancing black identity and solidarity, may increase separatism and racial hostility; no evidence is presented by the critique that shows the converse. But is this a negative finding? I admitted in my original study that it might not be interpreted as such; on this point I obviously have no quarrel with my critics. I do, however, maintain that *this is not an expected finding*, either according to social science (which has long held to the Allport thesis that contact will reduce prejudice) or according to educational policy makers, most of whom stress the beneficial contribution of contact to racial understanding and harmony. And if it is contrary to expectations, it seems to me that this has very definite policy implications. Although the Supreme Court intended its 1954 ruling in favor of school integration to improve the self-concept of black people, it is highly doubtful that it expected this to be done at the expense of an increase in black hostility toward whites or white hostility toward blacks.

It seems clear that the biggest difference between my perspective and that of the critique is in regard to the policy implications of all this research. They have failed to show that the findings in my original five-city study were untrue; they have not provided convincing evidence that other programs have succeeded where these have failed; they have ignored the possibility of harmful effects. In short, their opposition to my recommendation against mandatory busing is based mainly upon the *possibility* that under certain conditions induced school integration *might* have substantial beneficial effects on minority students. In this regard, given Pettigrew's well-known use of social science findings in support of integration, their conclusions rely heavily upon the application of a double double standard.

Their belief in the possibility of educational benefits rests upon their highly questionable rejection of black and white achievement comparisons and upon a variety of small and inconsistent fluctuations in the achievement of bused students. This leads them to hold that my "firm policy conclusion against 'mandatory busing' is not substantiated by the evidence presented." Apparently, then, their view is that mandatory busing (or induced integration), whether ordered by the courts or by a local school board, is strictly a moral and constitutional issue and does not require any justification involving educational benefits. They have therefore placed the burden of proof not upon those who back the social intervention but upon those who object to the intervention.

I cannot agree with the assumptions behind this reasoning, with the kind of morality it represents, or with the implicit suggestion that social science should be used only when it favors the values of the social scientist. There is no doubt in my mind that our democratic values prohibit laws or actions that force the separation of racial or ethnic groups; I believe that the 1954 decision of the Supreme Court aimed to eliminate this compulsory separation of the races in the schools. But I also believe that compulsory integration—in the absence of clear evidence that the segregation was itself purposive and mandatory—gains little support from these same democratic principles. This is why most legal decisions and policy actions in the school desegregation movement have rested very heavily upon the assumed educational benefits of integration. In the absence of a clear constitutional or moral mandate to force racial balance in regions of de facto segregation, supporters of school integration turned to social science—where there was an unending (and unquestioned) supply of documentation of both the damage from racial segregation and the benefits of integration. This was the case in the 1954 decision (even though forced segregation was at issue); I believe it was true for the 1967 report of the U.S. Commission on Civil Rights, as exemplified in its summary statement that the "conclusions drawn by the U.S. Supreme Court about the impact upon children of segregation compelled by law . . . applies to segregation not compelled by law"; and I believe it is true for the present critique, which tries very hard—but without success—to challenge the findings of current research on induced integration.

But it follows that if the current research does not support the thesis of educational benefits, the policy must be questioned. Since the intervention has been based upon what I would call "preliminary" social science findings (very little of the data until recently was based on studies of *actual* induced integration), the burden of proof must fall upon those policy makers who support mandatory busing. The first double standard of the critique, then, is the burden of proof: To initiate the action one can use any type of social science data, whether or not it directly tests the policy in question and regardless of its technical adequacy. But once the integration policy is in full force, it cannot be questioned unless one can *conclusively prove* that school integration *cannot* have an effect on educational benefits. As far as I am concerned, the current data are far more adequate to test the efficacy of integration than was the research that existed prior to induced integration programs. Since it can in no way be concluded that the original research *proved* the existence of educational benefits, my critics clearly apply a double standard when they claim that the absence of benefits has not been proven and therefore we should not decide against mandatory busing.

THE second double standard is applied by the critique's assertion that the whole matter is really a constitutional issue, to be decided by "the Court's interpretation of the 14th Amendment." The double standard here is obvious. One willingly applies social science findings to public policy if they are in accordance with one's values, but declares them irrelevant if they contradict one's values. Pettigrew's resort to this tactic recalls a press conference reported in the *New York Times* on June 11, 1972, in which Dr. Kenneth Clark—whose scientific research and assistance was so important in the 1954 Supreme Court decision—was quoted as saying that "courts and political bodies should decide questions of school spending and integration, not on the basis of uncertain research findings, but on the basis of the constitutional and equity rights of human beings." The double standard could not be expressed more graphically.

It will be disastrous for the social sciences if they allow themselves to be used in this way. We social scientists depend upon society for our existence; our credibility is undermined if we do not present and use our findings in a consistent manner. The responsible use of social science in policy matters requires that we state the facts as they occur, no matter how painful their implications. And if we are willing to use facts to initiate policy reform, we must likewise use them to question existing policy. I believe that in the long run society will benefit more from decisions based on facts than from ideology contradicted by facts.

I do not want to imply that we should engage in social intervention only when it is supported by social science or stop any social intervention when the findings of science question its support. Social science cannot be brought to bear on all issues of policy, sometimes for technical reasons and sometimes for ethical reasons. Some policies cannot be researched, and some policies are demanded by constitutional principles or by common morality. But when policies are based upon empirical considerations that social science can study, there is a way that policy and science can proceed in concert. That way utilizes the method of social experimentation and evaluation—a method that has long been prominent in the medical sciences. We would not think of prescribing a new drug without first obtaining sound evidence of both its efficiency and its harmlessness by experimental evaluation of its actual effects on human subjects (usually volunteers). Why should not a similar standard be applied to proposed remedies for curing social ills? Our assumptions about social behavior have been proven wrong in the past, and they will be proven wrong in the future. The only way to make reasonably sure that the remedy is not worse than the malady is to engage in careful research under realistic conditions. That our government is beginning to adopt the principle of social experimentation is shown by Congress's recent decision to perform a large-scale, long-term experiment to test the efficiency of a guaranteed income plan before implementing it for the whole nation. This is a welcome sign for those who want to see a closer connection between social science and public policy.

It is this kind of philosophy that led me to favor voluntary busing programs, not any evidence that voluntary busing is more efficacious than mandatory busing. I do not think the evidence pointing to an absence of educational benefits or the evidence for possible harmful effects is strong enough to justify a prohibition of busing for those families and communities that desire it—regardless of their motives. On the contrary, I would like to see more voluntary busing on a controlled, experimental basis accompanied by a careful research and evaluation effort. This is the only responsible way to resolve the controversy and to establish sound guidelines for policy makers.

On Pettigrew and Armor: an Afterword

JAMES Q. WILSON

THOSE who have read David Armor's "The Evidence on Busing" and now find in this issue a lengthy rebuttal by Thomas Pettigrew and colleagues and a surrebuttal by Armor might be forgiven for throwing up their hands in despair at the apparent inability of social science to give clear and simple answers to important questions. One is powerfully tempted to decide that social science has nothing to say—or worse, too much that is inconclusive to say—about matters of public policy. Why not, one might ask, let the question of desegregation and busing be decided entirely on the basis of what one feels is right without regard to scholarly haggling?

Though understandable, *The Public Interest* feels that such an attitude is mistaken—as mistaken as the attitude that scientific findings can be decisive on matters of social choice. Social science, if carefully done, can under certain conditions measure the relationships among two or more elements of a social situation, and more often than its critics suppose discover relationships that are contrary to popular supposition. When the late Samuel Stouffer taught his sociology course at Harvard, he often began by giving the students a quiz in which they were asked to decide whether certain statements were true or false—and of course the students tended to pick the "obvious" answers, all of which were contrary to scientifically-established fact.

The circumstances under which social science can produce non-obvious, non-trivial, valid findings are unfortunately not as commonplace as we would like. One must be able to define and measure with some precision the factors under consideration, to study or manipulate them without changing them in unknown ways, and to isolate them either experimentally or statistically from the influence of other factors. When these circumstances occur and where there exists financial support for such inquiries, social science prospers—as it has in voting studies and market research. The effects to be explained (a vote, a consumer purchase) are unambiguous and easily measured, the factors generally thought to produce these effects (the income, education, religion, or occupation of the voter or consumer) are also easily measured, the carrying out of the study (at least after the fact) does not alter the decision, and political candidates and business firms are willing to pay for the results.

Studies of the effects of segregated or desegregated schools (or even studies of schools, period) rarely meet all of these criteria; neither do efforts to understand the causes of crime, of persistent unemployment, of broken families, of drug addiction, and of racial differences (if any) in intelligence. Either the effects to be studied are hard to measure (as with educational attainment or true crime rates), or the possible causes are hard to define and detect (as with most habits of mind and of personality), or the possible explanatory factors are hard to disentangle (as with race, class, and education), or the act of studying the situation alters it (as when persons who are part of an experiment come to like—or dislike—the special attention that is being paid to them).

Because of these considerations, and after having looked at the results of countless social science evaluations of public policy programs, I have formulated two general laws which cover all cases with which I am familiar:

> **First Law:** All policy interventions in social problems produce the intended effect—*if* the research is carried out by those implementing the policy or their friends.
>
> **Second Law:** No policy intervention in social problems produces the intended effect—*if* the research is carried out by independent third parties, especially those skeptical of the policy.

These laws may strike the reader as a bit cynical, but they are not meant to be. Rarely does anyone deliberately fudge the results of a study to conform to pre-existing opinions. What is frequently done is to apply very different standards of evidence and method. Studies that conform to the First Law will accept an agency's own data about what it is doing and with what effect; adopt a time frame (long or short) that maximizes the probability of observing the desired effect; and minimize the search for other variables that might account for the effect observed. Studies that conform to the Second Law will gather data independently of the agency; adopt a short time frame that either minimizes the chance for the desired effect to appear or, if it does appear, permits one to argue that the results are "temporary" and probably due to the operation of the "Hawthorne Effect" (i.e., the reaction of the subjects to the fact that they are part of an experiment); and maximize the search for other variables that might explain the effects observed.

People will naturally disagree over whether a given policy evaluation by a social scientist supports either the First Law or the Second Law. Many considerations prevent that argument from being carried on very intelligently—the loyalties and commitments of the scholars involved, the efforts of partisans and polemicists to defend one interpretation absolutely and to reject the other entirely, the defensiveness of whatever government agency is being praised or blamed by the study in question, and the tendency of human affairs to be so complex and ambiguous as to make the possibility of designing and executing a Decisive Experiment all but impossible.

If this is the case, on what grounds can anyone defend such policy-evaluating social science as exists? In part, because some studies *do* provide answers, even when judged by the most rigorous standards

—it is a sad but clear fact, for example, that the reading scores of black children in big-city elementary schools lag significantly behind white scores. (What is at issue is not the difference, but what causes it and what may be done about it.) But in large part social science evaluations, and the debates over them, are useful because they expose the complexities of a problematic situation, extend the range of possible explanations for those conditions, increase our awareness of the unintended as well as intended outcomes of any policy intervention, and stimulate us to reflect on the inadequacies of our own preconceptions about the matter. In short, serious social science, seriously debated, can be a civilizing influence, despite the fact that some of its critics regard the very effort to be scientific as uncivilized.

Social science begins by attempting to simplify human affairs in order that they can be more easily explained, but it often ends by making them even more complex than originally supposed. It is perhaps this tendency that leads some persons, impatient for change, to charge social scientists with being "conservative" (an otherwise hilarious accusation, given the political predispositions of most social scientists). The more complex a situation is thought to be and the greater the importance of subjective, as opposed to material, conditions in explaining it, the more intractable it will seem to be. In the long run, the Second Law tends to cover more cases than the First Law. But in the long run policy will be made whatever social science may say and, indeed, the commitment to policy change is in many cases a necessary precondition for an evaluative study.

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Irving Kristol, Editor

Senator DeConcini. Dr. Armor, let me ask you a question. In what communities has busing been implemented in the most effective and least disruptive manner? Have you studied any cases where it has been less disruptive than the *Los Angeles* case or some other areas?

Mr. Armor. Of course I have only studied closely a couple of dozen desegregation cases and there are hundreds. However, in my own personal experience, the least disruptive desegregation plan right now is in San Diego. It is also under supervision of a State court, but the State court eliminated the possibility of mandatory busing and said it would not consider it because of white flight.

Senator DeConcini. When you are talking about successful cases, you would say, obviously, the voluntary is more successful?

Mr. Armor. Absolutely.

Senator DeConcini. When you get into the voluntary busing case, how do you determine its success? Is it primarily based on white flight or less disruption?

Mr. Armor. Less white flight, more support in working with the community toward a plan, realizing that in a voluntary plan it will take longer to get the result that perhaps mandatory busing might seem to get in the first year, but then 5 years later there are so many white students gone that it is really less effective than had you taken the more gradual approach as San Diego has, which is basically a 5-year plan. It is amazing how many white students will transfer, for example, to minority schools on a voluntary basis if you put programs in those schools that are attractive to white students. It will work.

Senator DeConcini. My last question on that subject matter is on the voluntary plans. Have you studied enough cases where they have succeeded to allow you to draw the conclusion that voluntary plans do work even though they take longer?

Mr. Armor. Quite frankly, not enough districts have been permitted to do voluntary plans to allow us to test it.

Senator DeConcini. Do you know how many have?

Mr. Armor. In terms of a complete voluntary plan, I think there are only a few in the major cities.

Senator DeConcini. San Diego is one?

Mr. Armor. San Diego is one of the very, very few. Dayton had a voluntary plan for awhile. Milwaukee had a voluntary plan for awhile. However, when the court is involved, it simply does not give it much time. If the voluntary plan does not work in a year or two, mandatory busing is ordered. We really do not have enough cases to make a solid generalization.

Senator DeConcini. When you commence a voluntary plan, it is my assumption that this includes a real commitment by the governing jurisdiction to put attractive programs in the schools to where they want voluntary movement. Is that a fundamental requirement?

Mr. Armor. It requires a commitment and it requires money to do that.

Senator DeConcini. More money has to be spent?

Mr. Armor. I think there is no question it will take money in the magnet school area to build the kind of programs that will attract white parents.

Senator DeConcini. Without any studies to prove so, it is your belief that this would succeed?

Mr. Armor. I think in many cases it would, yes. That is my opinion.

Senator DeConcini. I have no further questions, Chairman Thurmond.

Senator Thurmond [acting chairman]. I had an opening statement which appears following the other opening statements in the record.

I want to thank the distinguished chairman of the subcommittee for beginning hearings on the subject of schoolbusing.

As most people recognize, this is a controversial subject which has both ardent advocates and opponents. As time has gone by, however, I believe more and more people have reached the conclusion that busing of children away from neighborhood schools is not in the best interests of all concerned. The strains that are placed on families, schools, and local public officials, even the police, to meet the requirements of busing orders have had a profound effect.

A renewed look at this issue is timely, and again I commend the chairman for holding these hearings.

I am a cosponsor of S. 528, a bill to limit the injunctive relief courts may impose in busing suits. I support that bill because it is a move in the right direction. It would orient the actions of the courts and the Justice Department toward equal educational opportunity and away from racial quotas through forced busing.

I would be willing to consider any measure in this area that will make quality education for our children its primary purpose. I look forward to hearing from the witnesses who are with us today.

I have a few questions, Dr. Armor, that I would like to propound to you.

There have been many social effects because of court-ordered busing, primarily white flight and the growth of private schools. Will these effects continue if court-ordered busing continues?

Mr. Armor. I think they will. There is no question about it.

Senator Thurmond. One of the witnesses to be on the panel later this morning, Professor Graglia, is recommending the repeal of title IV of the Civil Rights Act, which authorizes the Attorney General to bring suits to require desegregation. Would this be a reasonable step toward limiting court-ordered busing?

Mr. Armor. If the Justice Department did not recommend mandatory busing or plans like that, then I am not sure there would be any problem in pursuing title IV. I think the issue has not been and is not desegregation. The issue is in mandatory reassignment of students to other schools.

With all due respect, I think title IV does not have a problem in and of itself. If there are constitutional violations, I think they should be pursued in the courts and by the Justice Department. However, I think we have to get rid of remedies that in fact are not remedies at all and that simply make the problem worse.

Senator Thurmond. Dr. Armor, what steps could the Congress take to improve the health of the educational system in this country which would lead to quality education for all, black, white, or other ethnic groups?

Mr. **Armor**. I think the Congress has to be assertive about the disastrous effect of court intervention. The Congress has to take over the legislative responsibilities and essentially get the courts out of the public schools, not for the purpose of determining violations or remedies, but for the purpose of massive social reform, massive busing, which is not a proper remedy for the violations found. I think it only exists because perhaps Congress and local legislatures in the past have not been assertive enough in claiming that area for themselves.

Senator **Thurmond**. Dr. Armor, what are some of the adverse effects on schoolchildren who must be transported away from their neighborhoods to other schools?

Mr. **Armor**. Well, the adverse effect I do not think is so much on the child. Of course the schoolday becomes longer. There is less time for activities. In Los Angeles, the children get up at 5 o'clock in the morning. Some of the bus rides in Los Angeles were 1½ hours each way making 3 hours on the bus. Clearly, a lot of time is being spent in activity that is not furthering their education.

However, I think the real harm is more at the community level and the fact that with this kind of intervention, with this kind of completely noncredible policy, the public simply loses support and interest in the public schools. The public feels the courts have taken over. It becomes the last straw for a number of other problems that some parents feel about the public schools.

I think the harm is on the system perhaps more than on the individual child.

Senator **Thurmond**. I believe Senator Helms made a statement that one child in Charlotte of a particular race—I do not recall which race—was transported about 20 miles or more just to bring about a racial balance in another school. Would that appear to be a wise course to follow for the best interests of the children?

Mr. **Armor**. Since we have not shown any benefits from that transportation and being reassigned for either minority students or white students, I do not see how it can be a beneficial policy. It is a lot of time, a lot of money, and a lot of energy that is going for no particular educational gain.

I would rather see that money spent, quite frankly, on some of the educational problems that exist in our central city schools, in minority schools. The money would be better spent on compensatory programs, programs that are devoted directly to spending more time on educational activities and not more time to bring about racial balance.

Senator **Thurmond**. I think the question of desegregating the schools in this country is clear. So far as I know, all public schools are desegregated in all the States. In South Carolina, my home State, the schools have been desegregated and we probably have had less trouble in the South than in some other sections of the country such as New York State and Cleveland, Ohio, and in Boston, Mass., where they seem to have had considerable trouble and so forth.

I want to ask you this question: When you haul city children of certain race to go to a school of another race, someone said that that actually more or less stigmatizes a child and in a way designates such a child as inferior, or those who are left as inferior. In other words: Is it placing a badge of inferiority on somebody that they have to mix with somebody of another race to overcome that badge of inferiority? Do you have any comment on that?

Mr. ARMOR. I think that that is a complicated area. I think in the past there have been strong opinions on the part of minority leaders that the best education only takes place in an integrated environment.

However, I think there is a growing sense on the part of many minority leaders that that is a kind of racist concept, that minority and black children can, in fact, learn in a school that is predominantly black so long as the quality of the program is sufficient.

Based on my experience as a social scientist, I, personally, do not see any reason why there should be any stigma attached to one way or the other, whether the school is mostly black, mostly white, or integrated as long as the educational program is adequate.

Senator THURMOND. In other words, if we transported the children to the nearest school, and if anyone wanted to go to another school, let them go at their own expense, but if the public transported them to the nearest school, whether it is all white, all black, 70–30, 60–40, are we performing our duty to the children?

Mr. ARMOR. I think the duty is to provide an adequate education, a good education in that school.

Senator THURMOND. Is that not the purpose after all, to provide good educational opportunities? Is that not the purpose of schools to educate children and not consider whether they are white or black, or what race or religion or sex they belong to? It is just to educate them all and treat them all alike. Is that not the fair way to do it?

Mr. ARMOR. I certainly agree. I do think we have to acknowledge though that there are cases where there has been discrimination.

In Omaha, a case I worked on a couple of years ago, there were cases where there were discriminatory boundaries drawn. We cannot deny the existence of discrimination in the schools, and in the South where there was, in fact, at one time mandated separate schools.

Senator THURMOND. That was de jure.

Mr. ARMOR. It was de jure.

Senator THURMOND. It was de jure segregation by law.

Mr. ARMOR. We have to get rid of those cases.

Senator THURMOND. The officials are bound to uphold that law, but in the North and other parts of the country, it was de facto. It was segregation in fact; was it not?

Mr. ARMOR. Most of it was due to housing patterns and not to the specific violations. That is correct.

Senator THURMOND. In other words, there was segregation in both parts of the country. One is by law and the other was by fact. However, the laws have been stricken down and everybody is on an equal basis, so to speak.

It seems to me we ought to be looking toward educating the children, giving them the finest opportunities possible regardless of race, color, sex, and do all we can to improve the lives of those children.

Mr. ARMOR. I agree, sir.

Senator THURMOND. Thank you very much.

Mr. **Armor**. Thank you.

Senator **Thurmond**. Senator Hatch has some questions he will submit for the record. We will not have you answer them now, but you can answer them for the record.

Mr. **Armor**. OK. Thank you very much, sir.

Senator **Thurmond**. We now have a panel to testify: Prof. Nathan Glazer, Mr. William Taylor, Prof. Lino Graglia, and Mr. Julius Chambers.

Starting on the left, please give us your name, your occupation, and where you are from.

Mr. **Glazer**. I am Nathan Glazer, professor of education and sociology at Harvard University.

Mr. **Graglia**. I am Lino Graglia, professor of constitutional law at the University of Texas Law School.

Mr. **Chambers**. I am Julius Chambers, president of the NAACP Legal Defense Fund.

Mr. **Taylor**. I am William Taylor, adjunct professor of law at Catholic University Law School, and director of the Center for National Policy Review.

Senator **Thurmond**. I assume you gentlemen have statements you would like to make at this time. We will start on the left. The full statements will be made a part of the record following your oral presentations.

STATEMENT OF NATHAN GLAZER, PROFESSOR OF EDUCATION, HARVARD UNIVERSITY

Mr. **Glazer**. My statement will be very brief. I will submit it for the record. I think most of the points I wanted to raise have already been very well presented by David Armor.

I want to make only one additional point. Mr. Armor talked primarily about the effectiveness of remedies. I agree with him completely. The remedy of mandatory assignment of children to schools on the basis of their race has been ineffective educationally, hardly effective in increasing integration, and has been the policy that has perhaps been more opposed by parents in this country, white, black, Hispanic, Asian, than any other school policy one can think of.

I want to refer, as I say, to only one additional point, not on the ineffectiveness of remedies, but the reason why these remedies which are so dramatically in effect have come down or are imposed by courts.

I think the problem is that the question of the explanation for school segregation in situations where there has not been any mandatory school segregation, or in which this ceased some time ago, has been improperly approached and dealt with by courts.

The courts seem to take the position, at least in many cases, that the natural form of arrangement of ethnic and racial groups in American cities in the absence of State action, either of school authorities or housing authorities, would be an even distribution. They seem to expect, on the basis of evidence presented to them presumably, that in the absence of school action, in the absence of State action, there would be a situation in which you would have an even distribution of blacks, or of Hispanic Americans, or other groups that are sometimes the subject of this litigation in a city.

I think this is the most unreasonable of expectations. No groups are evenly distributed through cities or metropolitan districts. Groups are real. They have distinctive histories. They have different economic patterns. They have different tastes in housing. For all these reasons, we have always had concentrations of ethnic and racial groups in cities.

Admittedly, there is an additional factor in the case of blacks and other groups, a factor of discrimination, but this factor of discrimination in no sense explains the whole pattern, or even any major part of it.

The Supreme Court still takes the position that it is looking for de jure segregation, segregation by State actions, by law. The Court, and inferior courts, seem to me to accept very flawed evidence arguing that the distributions of black and white children, and children of other groups we find in public schools, are the result of State action.

I will not go into the details as to the reasons why I consider this evidence flawed, but I will refer to one kind of finding I think is terribly important. I will refer to a case in Boston. I think it can be demonstrated elsewhere.

In the *Boston* case, where the district judge found many cases of action by the school board that he said had led to concentrations of black children in the schools, a demographer by the name of Nathan Kantrowitz, in an article in the Annals, analyzed distribution of students in the schools and of people in residence through Boston.

He analyzed this before schoolbusing took place. The assumption you could work on is that if the school board had engaged in all these actions of segregation, the schools should have been more segregated than the people in Boston were. The fact is they were less segregated.

Most of the segregation in schools is a result of residential patterns. The residential patterns themselves are a result of economic differences, of taste, to some degree of discrimination, but even that discrimination is very often not State discrimination. It is discrimination by individuals who often simply exercise their right to move away and to make transitional areas largely black.

I will make one other further reference to, I think, the most important Supreme Court in this area, the one in the *Dayton* and *Columbus* case in which measures, that by any fair reading could have had only a minimal impact on the distribution of white and black students in Dayton and Columbus, were taken to be the cause of the distribution of students in Dayton and Columbus. On this basis, a mandatory busing scheme was imposed on the entire school district in both cases.

I think Judge Rehnquist's dissent in that decision is absolutely convincing that the distribution of schoolchildren in Dayton and Columbus was not the result of school actions, was not the result of State actions, and there was no constitutional requirement that an unpopular, ineffective, and undesired course of action be imposed.

I know this committee has no legislation before it and has no proposed amendments before it. To refer again to Senator Biden's frustration over the long period of time he has spent on this matter and on the difficulty of Congress in expressing the desires of the

American people to be able to impose any restraint on the courts in this matter, referring to all that, the question is: Is there anything the Congress can do?

In 1977, I testified before a subcommittee then chaired by Senator Biden. Senator Roth was present. They had a piece of legislation which I still think makes good sense.

The piece of legislation, in effect, said that one could not impose a desegregation requirement that was required more than correcting for the effects of any school action in distributing schoolchildren by race.

It can be argued that this is a very difficult test to apply. It is not a difficult test to apply. If schoolchildren are not more segregated in the schools of a district than people are segregated in their residential patterns, then there is simply no overall effect of State action in increasing the segregation of schoolchildren.

There is a good deal more I could say. I subscribe to everything David Armor has said. I will not take further time of the committee, except to say I think that piece of legislation of 1977 is worth looking at. That proposed legislation, I think, without being a constitutional lawyer and without knowing to what extent courts will accept the power of Congress to define what is unconstitutional discrimination, it is still worth a try.

Thank you.

[The material follows:]

TESTIMONY ON SCHOOL BUSING.

-- Nathan Glazer

"School busing," or the assignment of children to public schools on the basis of race in order to spread black and white children evenly through the public schools, is perhaps the most unpopular, widely implemented, school policy in the United States. Great majorities of white parents oppose it, in various surveys half or more of black parents oppose it, and undoubtedly majorities of Asian and Hispanic parents oppose it. Further it is undoubtedly one factor leading to the rapid loss of population, black and white, in cities in which it has been implemented. Additionally, it adds. even if only marginally, to the cost of public education, and in its initial stages leads to the loss of large percentages of white children to private schools and to schools in jurisdictions without busing. Why, then, do we find it in existence in many cities, with substantial threats that it will be imposed in cities which do not yet have it?

Three chief arguments are presented for it. By far the most important is that school busing is required under the Constitution in order to overcome the effects of unconstitutional segregation of black children. Clearly such an argument is best addressed by Constitutional lawyers, but there are aspects of it to which social scientists can contribute, and indeed have contributed. Since it is now at least a dozen years or more since desegregation as required by state law in the South directly affected school attendance by race, and many more years since segregation was practiced directly in the North and West, the question of the explanation of the prevailing patterns of attendance at public schools by race is an important one. The facts as to this distribution are not in dispute: Almost everywhere in the absence of busing most black children attend schools that are almost entirely black, most white children attend schools that are almost exclusively white (though substantial proportions of black children are found in white majority schools, and some white children are found in black majority schools). The Supreme Court requires evidence that this distribution is caused by public action in order to consider it, in whole or in part, state-imposed desegregation, de jure segregation. Thus, in the absence of laws requiring such segregation, it is necessary to conduct an investigation as to causes before busing can be required. The facts relied on by courts to find de jure segregation are the shifting of school zone boundaries, the siting of new schools, the closing of old schools, the overcrowding or undercrowding of schools, the provision of temporary classrooms to accommodate overcrowding, all in relation to racial changes in school-going populations. These demonstrations are defective in various ways as evidence of state-imposed segregation:

(1) Many of the actions took place a long time ago, and the reasons for them are no longer clear.

(2) Many took place at a time when there were no racial censuses of school children.

(3) Some may have taken place with the active support of black communities, who have always been interested in good schools and new schools, and who often are not concerned that new schools in black neighborhoods would be black schools.

(4) Causes are always multiple, and hard to disentangle.

(5) Most important, when the black population of cities is rapidly growing -- as has been true since World War II -- schools in growing black neighborhoods will become predominantly black schools, whether or not school zone boundaries are shifted, or large schools are built, or small schools, and whether or not they are planned to be placed in the middle of black neighborhoods or on their edges. With a rapidly growing black school population, and a neighborhood school policy, all schools in the path of growth will become black.

On occasion, the Supreme Court has suggested, to counter the argument that these school populations are the result of neighborhood concentrations, that the neighborhood concentrations are themselves caused in part by school segregation. But this argument is specious: Black neighborhoods exist because of the rapid growth of black populations, their relative poverty and discrimination in housing -- and since the latter is in large measure caused by individuals and families exercising their option to move, it is almost immune to influence by public policy. (See Eleanor P. Wolf, "Northern School Desegregation and Residential Choice," in The Supreme Court Review, 1977, pp. 63-85.)

The most reasonable conclusion that social scientists can draw is that distribution by race in public schools is almost exactly what we would expect on the basis of the geographical distribution of black and white children of school age. Whatever the motives of the almost unrecoverable and innumerable actions of school boards, they are not the cause of the distribution of black and white children in public schools. [Kantrowitz]

One may ask why courts have been so often convinced that these actions are the result of school board actions. There are, I think, three reasons for this. The first is that most social scientists think that school desegregation by any means is a good thing, and are willing to testify that school board actions have caused segregation. There are many fewer social scientists who will testify to the contrary. The second is that the advocates of school desegregation through busing are far more experienced in litigating school desegregation suits than the lawyers for school boards or states. The third is that the Supreme Court has on the whole accepted weak and specious evidence to prove de jure segregation. [Rehnquist dissent in Dayton and Columbus.]

There are two other arguments for desegregation that may have no constitutional standing but which play an important role I believe in leading judges to find for plaintiffs. Once again social scientists play an important role in advancing both arguments.

The first is that going to school with a majority of whites is necessary for black school achievement to improve. There are reasons why we might in theory expect this. The fact is it has not been demonstrated, and in the nature of the case it is hard to see how it can be demonstrated.

School desegregation is not one thing but many things, depending on the school district and the school. Of course if school desegregation is accompanied by a massive infusion of Federal funds, innovative curricula, cooperation by business and local colleges, school achievement may improve (though it may also not), but in this case, to what are we to attribute the improvement?

A second is that race relations between blacks and whites generally will thereby improve. Once again, in the nature of the case, this cannot be demonstrated: desegregation, as implemented, means so many different things -- as does good race relations -- that we are likely to find improvement in one situation, deterioration in another, or improvement by some measures, deterioration by another in any given case.

The Supreme Court, inferior Federal courts, and plaintiffs' lawyers have operated on a peculiar view of race and ethnicity in the United States: They take as a desirable norm the even distribution of each group in every institution in the society. This has never been the case with ethnic and racial groups. Groups have distinctive experiences which shape them: Some are more urban or more rural, more or less prosperous, more or less educated, concentrated in one region or another. All this, and much else, must make for difference. Discrimination as a cause of these differences is prohibited by law. Many other causes of difference cannot be reached by law. Because of these prohibitions of discrimination, in part, and because of enormous declines in prejudice and discrimination by the white population, we have seen a huge increase in the proportion of blacks in formerly white colleges, in the income of working blacks, in the proportion in white-collar work and the professions, in the number of blacks elected to office, in the proportion of blacks moving, like whites before them, to newer residential areas. All this _is_ producing more integration and better race relations: Busing is not responsible for these positive changes, and does not contribute to good race relations.

Under these circumstances, what role can Congress play? Once again, this is a matter for lawyers and elected representatives primarily, but

I believe that Congress can, by legislation, define prohibited segregation in such a way that the school concentrations that do not diverge from what might be expected on the basis of neighborhood concentrations is clearly declared to be *de facto*, not *de jure* segregation.

I realize some consider this interference in the proper role of the Supreme Court: I do not. The Court has given ambiguous and inconsistent guidance. The *de facto* segregation of Dayton I turned into the *de jure* of Dayton II. Both decisions were bitterly disputed. If the Court cannot decide, let Congress.

A second argument (against Congressional action) is that where busing is now working well it will be ended. I am not sure what "working well" means, but in a political system where blacks share political power, and are dominant in many cities, I am confident that where it is working to general satisfaction it will be retained.

A third argument is that all progress to school desegregation will cease. I don't agree with that either. School integration can come in many ways -- through the nonpublic schools, where the proportion of blacks is growing, through voluntary programs, which have been denigrated by the advocates of forced busing, and generally through the changes in education, occupation, income, and residential concentration that are taking place in the black population.

Senator **Thurmond**. Professor Glazer, I believe you formerly taught at the University of Californa at Berkeley?

Mr. **Glazer**. Yes.

Senator **Thurmond**. Since 1973, you have been the editor of one of the most provocative and consistently informative magazines on the American scene, the Public Interest.

Mr. **Glazer**. That is true. I mean it is true I am editor.

Senator **Thurmond**. I believe you are the author of a number of most significant works of social analysis that have appeared in this country since the Second World War, including the "Lonely Crowd," written with David Riesman; "The Social Basis of Communism; Beyond the Melting Pot," written with our colleague, Senator Moynihan; and "Affirmative Discrimination-Ethnic Inequality and Public Policy."

I believe you were also the author of a number of important articles on schoolbusing.

Mr. **Glazer**. Yes.

Senator **Thurmond**. We are very glad to have you with us today.

Mr. **Glazer**. Thank you.

Senator **Thurmond**. Professor Graglia, I believe you are professor of constitutional law at the University of Texas Law School.

Mr. **Graglia**. Yes.

Senator **Thurmond**. Professor Graglia has been a visiting professor at the University of Virginia and is one of the Nation's leading authorities on civil rights laws. He is the author of one of the outstanding works that has appeared on the subject of busing: "Disaster by Decree: Supreme Court Decisions on Race in the Schools." Professor Graglia is also the author of numerous articles on constitutional law.

We are very pleased to have you here. Would you care to make a statement now?

STATEMENT OF LINO GRAGLIA, PROFESSOR OF LAW, UNIVERSITY OF TEXAS

Mr. **Graglia**. I have submitted a fairly brief written statement. I will be even more brief orally.

What Professor Glazer was just telling us, I think, is a good thing to begin with. In essence, what he was saying is that the supposed factual basis for what the courts do, for court-ordered busing, does not exist. That is the case. The situation in this area is that what the courts purport or claim to be doing is not what they are actually doing in fact.

However, I take it the major thing we are concerned with here and now is what can Congress do? We have heard much about the harms and lack of benefits of busing that I agree with entirely. The question is what can be done about it? I believe it is high time that Congress act effectively and aggressively in this area.

THE CONSTITUTIONAL REQUIREMENT: DESEGREGATION, NOT INTEGRATION

To understand what it is that Congress can do about the busing requirement, it is necessary to understand exactly what the busing requirement is. Unfortunately, it is not easy to understand what the busing requirement is, because as I said, and as Professor Glazer in effect indicated, what the courts do and what the courts say are two different things in this area. It is an area where words are often used to mean the opposite of what they otherwise seem to mean.

For example, a prohibition of assignment of kids to school on the basis of race turns out to mean, surprisingly, that the kids must be assigned to school on the basis of race.

The most important thing to understand as a matter of constitutional law about this whole area is that in constitutional law, at least in constitutional theory, there is no requirement of integration or racial balance. The Supreme Court has told us many times that the mere existence of racially separated or imbalanced schools, or even the existence of one-race schools, is not a constitutional violation.

The constitutional requirement is only the ending of segregation, the abolishing of the use of racial discrimination in the operation of the school systems. Why then do we have busing, which it would seem is obviously intended to increase integration or create integration and which is, in fact, the use of racial discrimination and the assignment of children to schools on the basis of race?

THE DIFFERENCE BETWEEN DESEGREGATION AND COMPULSORY INTEGRATION

The courts tell us—it seems to me this is crucial to understand—that there is no requirement of integration, that the only requirement is desegregation, and that that is a very different thing.

How is it a different thing? It is a different thing basically in two respects. A requirement of integration would apply wherever there is racial separation. If you look at a school system and you find that schools are not racially balanced, then this requirement of integration would apply.

A requirement of desegregation, however, only applies where you find segregation in the constitutional legal sense.

One of the confusions here is that social scientists use the word "segregation" as synonymous with racial separation. That is the way Professor Armor, for example, was using the word.

In constitutional law, however, there is a very important distinction between segregation and the mere fact of racial separation. We can use words as we wish, of course, but if we wish to discuss constitutional law accurately and helpfully in this area, it is necessary to maintain that distinction.

A constitutional requirement of integration would simply be a constitutional requirement that is applicable wherever racial imbalance exists. A requirement of desegregation, however, which the courts say is a very different thing, applies only where segregation exists, only where the separation that exists is the result of racial discrimination by school authorities.

The second difference between a requirement of integration and a requirement of desegregation is that a requirement of integration would require whatever steps are necessary to produce as much racial balance as can be produced.

A requirement of desegregation, however, is not that at all. It is not a requirement to produce as much racial balance as you can. It is, after all, only a requirement to desegregate, end segregation. That is: To produce as much racial integration or balance as there would be except for the supposed violation, the racial discrimination.

MISTAKEN FACTUAL ASSUMPTIONS BY THE COURTS

This distinction is very important because it provides the whole basis and theory of busing, and it therefore provides Congress with a clear means of ending busing through legislative action. The courts have clearly misapplied their own theory, their own basis for busing. As Professor Glazer said, the facts do not support what the courts say they are doing.

We must assume that the courts have been unable to make accurate determinations as to the facts. That is, the courts apparently have not been able to determine what is the real cause or the real causes of the school racial separation that exists. The courts seem to assume and believe that all separation is a result of racial discrimination by school authorities.

That is, if there were no racial discrimination by school authorities, the schools would be very neatly balanced. That, as Dr. Glazer was just saying, appears not to be the case.

The courts seem to have failed to understand the facts as to that. It seems that they have also failed to understand the facts as to the effects of busing, what effect busing actually has on increasing rather than decreasing racial separation, what effect it has on educational effectiveness, what effect it has on the provision of equality of educational opportunity, and what effect it has on racial relations.

It seems to me the courts are operating under mistaken factual assumptions, and Congress ought to conduct factual investigations to determine and establish as best it can what seem to be the facts on these matters.

If Congress finds, as I think is the case, that the racial separation that exists in our schools is not the result of racial discrimination, then busing has no constitutional basis.

BUSING IS UNCONSTITUTIONAL RACIAL DISCRIMINATION

The constitutional basis for busing is that it is undoing racial discrimination, but if the separation is not the result of racial discrimination, the busing cannot be justified on that ground. The busing then is not desegregation. Indeed, the busing then is simply the practice of racial discrimination. The practice of racial discrimination by government is forbidden by the equal protection clause of the 14th amendment.

First, Congress, pursuant to its power to enforce the 14th amendment, ought to prohibit, or, at a minimum, severely limit busing to those situations in which it, in fact, can be justified as the undoing of racial discrimination.

BUSING INCREASES RACIAL SEPARATION

Second, Congress could also support legislation prohibiting or strictly limiting busing on the grounds that, as I said, the courts seem to have misappraised the effects of busing.

Busing, as Dr. Armor said, in very many situations, large cities in particular, typically increases racial separation rather than decreases it and has adverse effects on equality of educational opportunity and on race relations.

It seems to me that Congress, as a means of enforcing the 14th amendment, could therefore prohibit busing because busing is separating the races. It is making our public schools and our cities more racially separate than would otherwise be the case. It is apparently increasing racial animosities. It is not aiding but hurting educational effectiveness. It is not contributing to but apparently has an adverse impact on equality of educational opportunity. Therefore, it seems to me that Congress has ample authority under the 14th amendment to simply prohibit, or at least strictly limit, busing.

Thank you.

[The material follows:]

The Fourteenth Amendment and School Busing

Lino A. Graglia

Rex G. Baker and Edna Heflin Baker Professor
of Constitutional Law, University of Texas
School of Law

In order for Congress to know what it can do about the busing requirement, it must first understand exactly what the busing requirement is. That, unfortunately, is not a simple matter. This is an area in which what the courts say they are doing and what they do in fact are often two quite different things. It is an area in which words are often used to mean the opposite of what they are ordinarily understood to mean; for example, a constitutional *prohibition* of the assignment of children to school on the basis of race can turn out to be a constitutional *requirement* that children be assigned to school on the basis of race.

The most important thing to know about the constitutional law of this area is that, in theory at least, there is no constitutional requirement of school racial integration or "balance." All that the courts require, they tell us, is compliance with *Brown*'s prohibition of *de jure* segregation, segregation compelled by law or by other racially discriminatory government action. The basic requirement, supposedly, is that children be assigned to school *without* regard to their race, free of all racial discrimination. In theory, the Constitution, since *Brown*, prohibits segregation, but does not require integration; the existence of racially imbalanced or even one-race schools is not, the Supreme Court has many times stated, a constitutional violation.

But why then do the courts require busing? Is it not obviously a requirement of school racial integration, and does it not necessarily require the assignment of children to school on the basis of race? No, the courts tell us, they do not require integration as such, but only "desegregation," something very different and that is, in fact, simply the requirement of *Brown*. Busing for "desegregation" may look a lot like busing to compel integration to those untutored in constitutional law, but they are nonetheless, for those learned in constitutional law, crucially different.

The basic differences are that, first, a requirement of integration would apply wherever school racial separation or imbalance exists, but a requirement of desegregation applies only where unconstitutional segregation exists--that is, there must be, not mere racial separation, which is not unconstitutional, but racial separation required by law or by the racially discriminatory action of government officials, which is a constitutional violation. Second, a requirement of integration would require school authorities to take whatever steps might be necessary to achieve complete school racial integration or balance, but a requirement of desegregation requires school authorities only to "remedy" the constitutional violation found, to undo the unconstitutional segregation--the requirement is, not to make the school system as racially balanced as possible, but only to make it as racially integrated as it would be except for the constitutional violation found.

The courts' supposed requirement of desegregation looks so similar to a simple requirement of racial balance to most observers because in practice they are the same. The problem, in a word, is that the courts do not do in fact what they claim to do. As Justice Powell pointed in the Keyes case eight years ago, what the courts require and justify as "desegregation" is in fact simply compulsory racial balance; it is not the remedying of unconstitutional segregation, as the courts claim, but the undoing of racial imbalance, whatever its cause.

First, courts that order busing do not in fact require an actual showing that the racial imbalance existing in a school system is the result of racial discrimination by school authorities, *i.e.*, unconstitutional segregation. In all or nearly all cases, it quite plainly is not; it is simply the result of the existence of areas of residential racial concentration, of the fact that people of the same race or ethnic group tend to reside in the same neighborhoods. Second, the courts do not in fact limit the busing they order to that necessary to "remedy" the constitutional violation (unconstitutional segregation) that they have supposedly found; they simply order that the schools be racially balanced, as if no school racial separation or imbalance would exist in the absence of racial discrimination by school authorities.

We must assume that the courts do not do in fact what they say they are doing only because they have been unable to make correct and accurate factual determinations as to the actual cause or causes of school racial imbalance. Congress, with its much greater resources for factual investigation, should itself determine the actual cause or causes of existing racial imbalance in our nation's public schools. This is a question subject to empiric investigation, and there are scholars professionally concerned with answering it. If Congress should find that, as would appear to be the case, racial discrimination by school authorities is not a significant cause of existing school racial imbalance, Congress should enact appropriate legislation, pursuant to its power to enforce the Fourteenth Amendment, to prohibit or limit busing.

If busing cannot be justified as a means of preventing or undoing racial discrimination by school authorities--i.e., as a means of enforcing Brown's prohibition of racial discrimination by government, as the courts claim--it becomes itself simply an unjustified practice of racial discrimination by government and, therefore, a clear violation of the Fourteenth Amendment. At a minimum, Congress should provide that all court-ordered busing cease unless it is actually shown in each case that existing school racial imbalance is the result of racial discrimination by school authorities, and Congress should further provide that if such a showing is made, any busing ordered should be specifically limited to that necessary to prevent or correct such racial discrimination.

The courts have apparently also been unable to determine accurately the effects of compulsory busing, particularly the longer-range effects, on school racial integration, educational effectiveness, equality of educational opportunity, and race relations. Again, these are matters subject to empiric investigation, and Congress should itself investigate and determine the facts as to these matters. If Congress should determine that, as would appear to be the case, court-ordered busing typically tends to produce more--rather than less, as the courts apparently believe--racial separation in the nation's public schools and to have an adverse impact on the educational effectiveness of the schools, on the provision of equal educational opportunity, and on race relations, Congress would have a further basis for enacting appropriate legislation, pursuant to its Fourteenth Amendment power, prohibiting or limiting court-ordered busing.

A further step Congress can take regarding the busing issue is to repeal Title IV of the 1964 Civil Rights Act, which authorizes the Attorney General to bring suits to require "desegregation." This would be of very limited effectiveness as it would prevent the filing of suits only by the government and would not affect existing busing. It is, nonetheless, a step to be recommended. The 1964 Act explicitly defines "desegregation" as meaning "the assignment of students to public schools and within such schools without regard to their race" and, redundantly, as not meaning "the assignment of students to public schools in order to overcome racial imbalance." The Act, however, has been applied to exactly the opposite effect, to require the assignment of students to schools on the basis of race in order to overcome racial imbalance. If the Act were faithfully applied according to its terms, it could not be a basis for court-ordered busing. It would then also be unnecessary, however, because the assignment of children to public schools on the basis of race--except pursuant to court order--no longer takes place. Making the purpose of the Act more clear by amendment would not seem possible, and in any event, use of the Act according to its actual purpose would, as just noted, make it unnecessary. Simple repeal would remove all basis for argument as to the government's authority and would prevent further misuse of the Act.

In my opinion, Congress should also investigate the possibility of alternative effective means of ensuring equality of educational opportunity to all persons. It would seem desirable, for example, that in general students or their parents be given freedom of choice as to the school the student will attend in the school district or perhaps even in other districts, with transportation provided at public expense. Unfortunately, it does not appear that problems of educational underachievement can be solved primarily with money, but money should be made available and used in any ways that seem to hold promise. There is no question, of course, that predominantly minority schools must be funded, equipped, and staffed at least as well as predominantly white schools; in fact, it would seem clear that greater educational resources should be devoted to schools where there is greater educational need. In short, once it has determined that court-ordered is not the answer to our educational and racial problems, Congress should attempt to determine what might be at least part of the answer.

Senator THURMOND. Mr. Julius Chambers is president of the NAACP Legal Defense Fund, and one of the Nation's most prominent civil rights attorneys.

He is presently associated with a Charlotte, N.C., law firm of Chambers, Stein, Ferguson & Becton.

Mr. Chambers played a major role in the litigation in *Swann* v. *Charlotte-Mecklenburg.*

As always, this committee is pleased to listen to the testimony of the NAACP Legal Defense Fund, and, in particular, to the testimony today of Mr. Chambers.

Mr. Chambers, we will be glad to hear from you.

STATEMENT OF JULIUS CHAMBERS, PRESIDENT, NAACP LEGAL DEFENSE AND EDUCATION FUND

Mr. CHAMBERS. Thank you.

I, too, will be brief in my opening statement. I will submit the correction of the name of the firm which has changed in the past couple of months.

I have been in private practice now for several years. I am making these statements not only as president of the Legal Defense Fund, but also as a product of segregation that existed in the South. I am a native of North Carolina. I was born and raised there and I presently reside there.

As an example of why I think the committee should be proposing legislation to improve efforts for desegregation, I want to use the example of the *Charlotte-Mecklenburg* litigation. Again, I will be very brief.

We filed the *Charlotte-Mecklenburg* case in 1965. At that time, the school system had had very limited desegregation with one or two students transferring under the freedom of choice plan in 1959. In 1965, the board, with an effort to try to further desegregation, decided to close all-black schools in the suburb. The board drafted plans that continued segregation of the schools even with the closing of the black schools in the suburbs, gerrymandered school districts. The board continued assigning teachers and other staff persons solely on the basis of race.

There was no question in 1965 that Charlotte-Mecklenburg operated a de jure segregated school system, and the court so found.

With that determination, the court opted for what it called a neutral plan of desegregation. That plan simply allowed the board to draw lines that the court considered neutral at that time. It also ordered the board to do something about desegregating teachers, but it left the segregated system intact.

In 1969, we reopened that school case. The court, in 1969 and 1970, found that the board had failed to desegregate the school system. It had purposefully created a racially segregated system and had failed to implement plans necessary to desegregate. There was no question in 1969 and 1970 that we had a State entity that had purposefully created a segregated system. Under the Constitution, that system was obligated to desegregate.

The board had tried several plans between 1954 and 1969, plans that had been advocated by some people who today say that busing has been a failure. It tried freedom of choice. It tried neutral zones.

Yet it had a racially segregated system, and not a de facto but a de jure such system.

In 1970, the court ordered the board to implement a plan that would desegregate. That plan included rezoning school districts, pairing and clustering schools, and, as one element, transportation of students.

I should mention that the transportation ordered by that plan did not substantially increase busing of students. I would also point out that the one student who was referred to a moment ago who supposedly was being bused 20 miles for the purpose of desegregating was not bused for that purpose. I would also point out that there were students in the system then being transported more than 20 miles for the purpose of maintaining segregation.

In the plan that was ordered into effect, the students were transported for a very limited period of time. The plan resulted in complete desegregation of all the schools in the system.

There was some opposition. There was some limited white flight. There was some development of private schools. However, what we have seen with that plan is a situation where the community has come together, where desegregation has, in fact, worked, where students, black and white, have been improving in educational programs, and where the community now actively supports a public education system.

The Charlotte-Mecklenburg system, when I first began work in North Carolina, had not only segregated schools but a rigidly segregated housing situation, segregation in job opportunity, segregation throughout the community. That was not de facto but purposefully required by State practices.

The effect of desegregation in Charlotte-Mecklenburg has been not only to improve relationships between the students and educational achievements of students, but also relationships among citizens in the community. It is an example, I submit, of what desegregation, including busing, would mean for the Nation.

Senator THURMOND. We will have to take a recess. There is a vote in the Senate. The committee will be in recess for a few minutes.

[Recess.]

Senator THURMOND. The committee will come to order.

Mr. Chambers, did you finish, or did you have something else you wanted to say?

Mr. CHAMBERS. I have three other points that I would like to make briefly.

Senator THURMOND. Go right ahead.

Mr. CHAMBERS. I would like to comment on the role that the courts have played over the years in desegregation of schools. There have been suggestions that the courts have overstepped their bounds and that the courts have misinterpreted the Constitution. I would just like to mention a few of the cases that have been principal cases of the courts in desegregation to point out that the courts have not only acted responsibly in these cases, but the courts have clearly followed the 14th amendment in directing relief.

In *Brown*, as we all know and as I understand everyone conceives, the court there addressed a de jure segregated school system and ordered that the 14th amendment required that there be relief.

In subsequent cases which have followed *Brown*, the courts have adhered strenuously to the requirement that one demonstrate intentional segregation.

For example, in *Swann*, the court pointed out clearly that relief could be ordered by the court only upon a finding of de jure segregation.

In *Keyes-Denver*, the court again pointed out that de jure segregation was the only type of segregation that would allow relief.

In all of the cases that I am familiar with where the court has addressed this problem, it has required strict adherence and truth to a showing of intentional segregation. Suggestions here and elsewhere that the courts have overstepped their bounds in finding segregation and ordering relief, I submit, are clearly misplaced.

Additionally, the courts have directed relief only to the extent that segregation is proven. It has clearly pointed out that a district court or other Federal court can direct relief in these cases only to the extent that de jure discrimination is proven. That was clear in *Swann*. It was clear in *Dayton* and *Cleveland*. It was clear in *Keyes*.

I think it is a misrepresentation to suggest that the relief that has been ordered is in excess of what discrimination has been found by the court.

I think it is also unfair to suggest that the court is stretching to find discrimination. In each instance where the court has sustained a finding or showing of discrimination, active practices of school officials to segregate have been clearly established.

With respect to the proposed legislation, I would suggest that the proposed constitutional amendment removing jurisdiction from the courts would not only be unconstitutional but would be unfair.

We have found over the years that it was the Court that has entertained efforts by minorities to obtain relief from discriminatory practices. The Court is obligated by article 3 of the Constitution to interpret the Constitution. We should leave that jurisdiction with the Court. I submit that it is constitutionally required to be left with the Court.

I think it is also unwise legislation to remove jurisdictional authority from HEW and from the Department of Justice to enforce the Constitution. During the 1960's and early 1970's, we saw that efforts by the Department of Justice were essential for minorities throughout the country to obtain relief against clear discriminatory practices.

HEW was also effective, and as jurisdiction was withdrawn from HEW, we have clear efforts by school systems to continue with racial and discriminatory practices with little hope by minorities who are affected to obtain relief.

In conclusion, in Charlotte-Mecklenburg and in many districts throughout the South, we have found that when efforts are being made on a national level to try to erase what has been accomplished, those efforts simply create more turmoil and false hopes for communities.

In many districts now that have desegregated, proposed legislation to limit busing offer hopes, and I suggest false hopes, to some school districts that they can now resegregate.

What we have seen during the past few months are efforts by some school districts to go back to what they call neighborhood schools and to simply resegregate their school districts.

We have seen many school districts that have desegregated and now endorse those efforts with enormous problems of trying to continue with those efforts because of hopes being created that they can resegregate.

If we want to put this problem behind us, I submit that Congress should now clearly declare that segregation, wherever it exists, in the North or South, must be redressed, and must be redressed through the only effective remedy that has been developed. That remedy includes busing of students.

Thank you.

[The material follows:]

TESTIMONY OF JULIUS LEVONNE CHAMBERS
BEFORE THE CONSTITUTIONAL SUBCOMMITTEE
OF THE SENATE JUDICIARY COMMITTEE
MAY 14, 1981

Thank you, Mr. Chairman, for the opportunity to testify before the Subcommittee today on busing as a remedy for unconstitutional school segregation.

My name is Julius LeVonne Chambers. I am President of the NAACP Legal Defense and Educational Fund, Inc. I have served as counsel in numerous civil rights actions, particularly in my home state of North Carolina. Among the cases I have litigated is the Charlotte school desegregation action, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

Unconstitutional School Segregation

In 1954, the United States Supreme Court declared that public school segregation imposed or required by law violated the Fourteenth Amendment's guarantee of equal protection of the laws. The evil that Brown v. Board of Education was directed against were dual systems of education in which the separation of black school children was invidious and stigmatizing. In the eyes of state law, black school children were inferior and not fit to sit in the same room and be educated with white students. Brown declared that separate educational facilities are inherently unequal, and that black school children are guaranteed a constitutional right to equal educational opportunity.

Instead of complying with the mandate of Brown to dismantle dual systems of education, school districts and states erected barriers to desegregation. There was defiant outright opposition to law, as in Little Rock, or, more usually, the day-to-day reality of persistent massive resistance. For years, litigation continued, and desegregation avoided and delayed. Throughout these years, black schools remained black, racial attendance zones remained, black students walked or were transported to black schools, black teachers were confined to black schools. Black school children who tried to transfer were made unwelcome and subjected to threats to life and dignity. There were few exceptions.

The law of school desegregation after Brown v. Board of education was decided, proved to be a tale of futility and the failure of remedy. Until 1968, the Supreme Court waited patiently for desegregation. Finally, the Court declared that dual systems of education must be disestablished "root and branch," and desegregation take place "now" and "immediately." The Court now looked to the bottom line, and measured the various dilatory measures proposed by school boards by the only equitable standard in light of the years of delay--their effectiveness in achieving actual desegregation.

Charlotte, North Carolina is a microcosm of this period. A school desegregation case was filed in 1965. After years of litigation, little desegregation was achieved with freedom of choice, rezoning and other remedies proposed by the school board. The school board totally defaulted. Finally, the lower courts ordered a desegregation plan in which each of the schools in Charlotte-Mecklenburg reflect, within broad range, the racial composition of the district as a whole, and which relied on student transportation. The plan was fair and equitable, achieving effective desegregation and spreading the burdens equally among all students. In 1971, the

Supreme Court upheld the use of student transportation in Swann where, as in Charlotte, all other means to desegregate had proved infeasible or ineffective. The remedial principles established in Swann have been applied elsewhere to achieve effective and equitable desegregation.

In recent years, the Court has recognized that school segregation created by the acts of school boards and states where there has been no state law also violates the Fourteenth Amendment. First, in Keyes v. School District No. 1, Denver, and then more recently in the two Ohio cases involving Dayton and Columbus, the Court has made it clear that racially discriminatory school segregation is not an evil limited to the southern states: the unconstitutional segregation of black school children on account of their race or color is a national problem. Unfortunately, today we are experiencing the same resistance to vindication of the constitutional rights of black school children in states outside the South that we had in the South throughout the 1950's and 1960's.

Student Transportation As A Remedy

In Swann, the Supreme Court stated that "[d]esegregation plans cannot be limited to the walk-in school." 402 U.S. at 30.

> Bus transportation has been an integral part of the public education system for years, and it was perhaps the single most important factor in the transition from the one-room schoolhouse to the consolidated school. Eighteen million of the Nations' public school chidren, approximately 39%, were transported to their schools by bus in 1969-70 in all part of the country.
>
> The importance of bus transportation as a normal and accepted tool of educational policy is readily discernible. ...

> Thus the remedial technique used in the District Court's order were within the court's power to provide equitable relief; implementation of the decree is well within the capacity of the school authority.

402 U.S. at 29-30. Commonly, courts make efforts to safeguard the health and safety of children, and schools located in integrated neighborhoods are exempted. The Court also stated that "[n]o rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations." 402 U.S. at 29. Thus, student transportation is clearly a remedy that the federal courts may permissibly use to right the constitutional wrong of segregation.

The Charlotte-Mecklenburg district is roughly 22 miles by 36, and covers 550 square miles. In 1968-69, there were 84,000 pupils in 107 schools. The busing ordered by the district court averaged seven miles and the travel time not over 35 minutes at most. Busing, however, was not new to Charlotte; under the previous policy students at all grade levels were transported an average of 15 miles one way for an average trip requiring over one hour.

The federal courts have approached the question of remedy in school desegregation on a case-by-case basis. The courts have looked to the particular facts in each case, and weighed various remedial proposals from the point of view of which combination will work, that is, result in effective desegregation. Busing is a remedy of last resort; it is resorted to when other desegregative tools prove unworkable or ineffective. The desegregation order in one case necessarily differs from that in another case: each has been developed for a specific case and a specific set of facts and circumstances.

In the decade since Swann, student transportation has proved a critical and necessary component of many school desegregation plans. This is particularly true where school districts default in their responsibilities and subject their black students to discrimination long after their right to equal educational opportunity has been declared.

The legal basis for student transportation is plain: it is a permissible remedy for unconstitutional school segregation. Some would isolate busing from its moorings as a remedy for a constitutional violation. However, this overlooks that busing is designed to correct an illegality, and that it arises as an issue only in the wake of a court adjudication of a wrong committed. Courts order busing and other remedial devices only when it is necessary. Nor is busing a penalty: it is as the Swann opinion holds, "a normal and accepted tool of educational policy."

Efficacy of Student Transportation

The social science literature on school desegregation can be briefly summarized. Black students' achievement scores often improve when they attend desegregated schools. The achievement of black students is highest when desegregation begins at the lowest grades. No study has found that black or white pupils suffer academically from desegregation. Black students attending desegregated schools are more likely to go to college or enter the labor market than those deprived of the opportunity for an integrated education.

However, we do not need social science research to tell us what we all know intuitively. As the Supreme Court stated in Brown v. Board of Education, "[t]o separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Desegregation removes black children from that situation. They are removed from a condition that society considers inherently unequal and stigmatizing. They are thus better able to learn, not only academic subjects but the values of a democratic society.

The experience in Charlotte has been precisely this, and it is the desegregation plan approved by the Supreme Court that has made it possible. In Charlotte, as well as other cities, educators have learned that desegregation has helped eliminate the fetters on the minds of black children, and freed them to achieve as much as they can.

Recent studies show that school desegregation can improve race relations, not just in the school system but also throughout the community. Indeed, a recent study demonstrates that metropolitan desegregation plans, such as that in effect in Charlotte, which involve both inner-city and suburban areas, contribute to significant increases in housing integration.* The Supreme Court in Swann had noted that intentionally racially segregated schools promote racially segregated neighborhoods. "Metropolitan school desegregation not only breaks into the school-housing segregation cycle, it sets up a very different dynamic. By opening up housing opportunities for minorities, by making the choice of an integrated neighborhood one that confers positive benefits, it supports the development of stable integrated communities." Thus, desegregation plans, if fairly and effectively implemented, are self-liquidating. In Riverside, California, the city with the longest experience with busing, after 15 years, only 4 of the 21 elementary schools require busing to racially integrate.*

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*Pierce, "Breaking Down Barriers: New Evidence on the Impact of Metropolitan School Desegregation on Housing Patterns" (Center for National Policy Review, Catholic University, 1980).

CONCLUSION

Busing is not the issue. The issue is whether unconstitutional school desegregation is to be effectively remedied. Most student busing has nothing to do with desegregation. Forty-one percent of America's school children go to school on buses; only 3% are transported for desegregation purposes.

Mr. Chairman, if this nation stands behind the guarantee of Brown v. Board of Education, then we should get on with the job of enforcement.

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*Id.

Senator **Thurmond**. I have a luncheon at 12 o'clock with University of South Carolina officials. Maybe Senator Hatch will be back in a few minutes to carry on. If not, we will let the staff continue the hearing and give all of you a chance to be heard.

Mr. Taylor is next. I believe you are director of the Center for National Policy Review here in Washington. You have been staff director of the U.S. Commission on Civil Rights as well as a representative for the NAACP Legal Defense Fund. Is that correct?

Mr. **Taylor**. I was an attorney for the NAACP Legal Defense Fund.

Senator **Thurmond**. I believe you teach at Catholic University Law School and you are widely considered to be one of the foremost experts in the country on civil rights law.

We will be glad to hear from you now.

STATEMENT OF WILLIAM TAYLOR, DIRECTOR, CENTER FOR NATIONAL POLICY REVIEW, CATHOLIC UNIVERSITY OF AMERICA

Mr. **Taylor**. Thank you, Mr. Chairman.

My involvement in school desegregation cases spans a period of some 25 years. You have mentioned some of the areas in which I have been involved.

Currently, I serve as counsel for the school board of Wilmington, Del., in a case that Senator Biden referred to this morning. I also serve as counsel for Indianapolis public schools in another metropolitan case. I also serve as counsel for black plaintiffs in the *St. Louis* case, which is also a metropolitan case.

Our center has also done research on a number of the questions and issues discussed here this morning and posed by the chairman. We would be glad to submit material for the record because I think it does bear directly on some of the questions you are considering.

I welcome the hearings this committee is having. The last hearings, as you may remember, Mr. Chairman, were those conducted by then Senator Mondale as chairman of the Senate Select Committee on Education in 1970 to 1972.

Those hearings, I think, were a model for what Congress needs to do in order to legislate. They heard not only from lawyers and from experts but from parents, members of school boards, administrators, and students in the communities around the country where desegregation has actually taken place. They also heard from experts who had done more serious and sustained work in some of the areas that are being discussed today and who hold views that are in contradiction to some of the views expressed today.

I would like briefly to address two of the questions the committee has posed about the current status of school desegregation and also what has been learned about the educational and community effects of plans that are in operation.

THE LEGAL BASIS OF COURT ORDERED DESEGREGATION

First of all, with respect to what the courts have done, contrary to statements that have been made here this morning that the courts have engaged in forced busing for racial balance or sociological experimentation, school desegregation has been judicially required only when acts of intentional racial discrimination have been proven in the courts.

There has been a consistent thread of decisions from *Brown* right up through the *Columbus* and *Dayton* cases that the Supreme Court decided in 1979. What was at the heart of the *Brown* decision, in my view, was the right of black people in this country to be exempt, quoting the Supreme Court, "from unfriendly legislation implying inferiority in civil society."

I think that point about *Brown* is now fairly well understood as it applies to the southern and border States where there were racially dual systems, but it seems to be less widely understood about the school desegregation cases that have arisen in the North and the West.

Yet from the Supreme Court's first decision in the *Keyes* case in 1973 through the *Columbus* and *Dayton* decisions, it has been perfectly clear, as Mr. Chambers has said, that desegregation is ordered only where the plaintiffs prove a condition of segregation resulting from intentional state action.

If the committee were to take the trouble to go through the record of court findings in northern cases, you would find a host of intentionally discriminatory practices: racial gerrymandering, discriminatory site selection in the location of schools, segregative transfer policies, the racial use of optional zones creating a zone to enable white students to move out of schools that are becoming integrated, and discriminatory teacher assignments. Those are just a few of the practices that the courts have found have created segregated systems over time.

I think if those who express some puzzlement about how Federal judges, and in many cases conservative Federal judges, could order what appear to be broad remedies, they only need examine the cases and learn that what the judges have been doing is what judges are supposed to do: applying well-established principles of equal protection of the law to the record evidence.

The courts have also exercised similar care in devising remedies for the constitutional violations they have found. They have operated under principles that have been repeatedly stated in the *Swann* and *Milliken* cases that the scope of the remedy should be tailored to the scope of the violation.

Before they order systemwide relief that ordinarily requires busing, they have required a demonstration that the violations were significant and were pervasive. Where that has not been the case, as in *Dayton I,* the Supreme Court refused to sustain an order for systemwide relief.

At the same time, the courts have recognized that purportedly neutral practices or remedies such as neighborhood assignment may be woefully insufficient to cure the violation. In *Swann* and *Keyes*, the Supreme Court acknowledged and spelled out that segregative school practices by public officials can have a profound influence on housing patterns. They can create racial segregation in neighborhoods.

Senator THURMOND. I have to go now. We will leave it to the staff to carry on until Senator Hatch comes back.

I want to thank all of you gentlemen for your presence here today. Please continue.

Mr. TAYLOR. Even in the cases where courts have ordered systemwide remedies, they have drawn limits. The limits have been based on time, on distance, and other factors on the extent to which you can use busing.

References were made to wide-scale busing. It is interesting to me that in the past in places like Virginia, Missouri, and other places, black students were bused hundreds of miles to attend boarding schools because there were no schools established for them in the communities where they lived. I did not hear some of that concern about busing being expressed in those days.

However, the Supreme Court has not ordered that done in the cases here. They have ordered limited busing which accords with the time and distances students are bused for other purposes.

In addition to the logistical considerations, the courts have placed time limits on desegregation orders. Those time limits, in essence, have been 3 to 5 years for active court supervision to accomplish the affirmative duty to desegregate.

Professor Glazer said that the court decisions were based on an assumption that groups would be evenly distributed according to their racial groups if there were no deliberate practices. That is not the assumption at all.

What the courts are saying, in essence, is that here is a system that has existed in some cases for many decades. You need to do something to dismantle that system and to do it effectively. If private preferences, such as Professor Glazer suggests, would lead to resegregation, that can happen over a period of time because the period of active court supervision is limited.

However, the further suggestion that racial and ethnic groups prefer to stick together, I think, is unfounded. If black people in this country were distributed in the schools the way other ethnic groups were distributed, there would be far more desegregation than there is today.

In short, I think any careful review of the record of the Federal courts and schools desegregation since *Brown* will disclose that the judiciary has acted cautiously and prudently and that it has disturbed the established order of segregated schools only when a convincing case of intentional discrimination has been made.

I have to say that I am astonished by some of the statements that I have heard made here this morning about judicial activists and courts out of control. I would have to ask what judges are the witnesses referring to? Are they referring to Chief Justice Burger and his opinions in the *Swann* and *Keyes* case? Are they referring to judges like the late Judge Roth in Detroit, Judge Dillon in Indianapolis, Judge Meredith in St. Louis, or Judge Gordon in Louisville? These are judges who are cautious and conservative by temperament and have come to their decisions only after studying the full record.

As to the statements that the courts are out of control, I think they are equally unfounded. They are very disturbing. We rely on the courts in this country to protect our most basic liberties. They are charged with the responsibility of protecting groups who cannot obtain equal protection of the laws elsewhere in the political process.

I think statements of the kind that I have heard made here this morning are radical and destructive of the liberties that we all rely on. Such statements ought to be of concern not just to those who are interested in school desegregation cases but those who rely on the courts to protect their rights in many other areas as well.

EDUCATIONAL EFFECTS OF DESEGREGATION

Let me turn briefly to the second question about the educational impact of desegregation. Contrary to the suggestions, and the statement was made here this morning by Senator Biden, that busing has been a failure the evidence shows that school desegregation plans involving busing have led to educational gains, that they have proved stable over time, and that they have been ultimately accepted by many of the communities involved.

I am sorry Senator Biden is not here, but I would say specifically as someone who has been involved in Wilmington that despite all the dire predictions that were made before that plan was implemented, it has gone very well. It has gone peacefully. There have been achievement gains in the schools. The communities are staying with it even though it is only in its third year of operation.

I would say Wilmington is one of the success stories. I would love to discuss with Senator Biden the evidence on which he believes that desegregation has not been a success in Wilmington, if that is, indeed, what he believes.

On the first point, that desegregation has led to achievement gains, the most important current research on the links between school desegregation and achievement scores has been conducted by social scientists Robert Crain and Rita Mahard.

What they did was to analyze very carefully more than 100 case studies of desegregation. They have found in communities such as Sacramento, Fort Worth, Nashville, Charlotte-Mecklenburg, and Louisville, the achievement scores of minority students increased significantly after desegregation.

No study has concluded that white students suffer academically from desegregation.

They have now gone beyond the question of whether to try to identify conditions under which desegregation produces the best results. In their most recent report which became available just last month, they conclude that metropolitan or countywide plans, such as the one Mr. Chambers described in Charlotte-Mecklenburg, and which involves substantial busing, have been the most successful in leading to achievement gains for minority students.

The Crain and Mahard findings are supported strongly by the results of the national assessment of educational progress that appeared just last month. The assessment reports major gains for black children in reading during the past decade, particularly black children in the Southeastern States. It is in the Southeastern States that school desegregation orders were implemented on a large scale in the 1970's and where the plans have been metropolitan or countywide in character because no boundary line divides the city and suburban districts.

Second, metropolitan desegregation has been stable and has achieved community acceptance.

A few years ago, there was a great deal of public attention on reports that suggested that desegregation was self-defeating because it would lead to white flight. It turned out that the conclusions of the most publicized report were based on data from big cities where school desegregation had never been ordered.

Almost all of the demographers and social scientists who have studied this issue have concluded that while there may be a 1- or 2-year impact, the declines in enrollments of central city schools stem far more from continuing suburbanization of whites, which is a movement of very long standing, than from desegregation orders.

In other words, if you looked at two central cities, one in which there was a desegregation order and one in which there was not a desegregation order, and then looked at them 5 years later, you are likely to see very much the same pattern whether or not there has been school desegregation in both cities.

A more accurate measure of the workability of desegregation plans can be obtained in the South where the plans have been metropolitan or systemwide. Again, in districts such as Tampa-Hillsboro, Charlotte-Mecklenburg, Nashville-Davidson, those plans which involve extensive busing have been in effect for about 10 years and have proved remarkably stable and successful.

Despite all the furor over busing, most parents are far less concerned about how their children get to school than the quality of their education. In the countywide plans where each classroom can consist of a majority of advantaged children, you have a favorable educational environment. In many of these communities, once desegregation took place, parents and educators worked very hard to improve the quality of total schooling for black and white children after desegregation. They have succeeded.

I would also suggest that you take a look at the recent New York Times CBS news opinion poll showing that most people in communities that have undergone desegregation react favorably to the experience after the plan has been in effect for 3 years.

Indeed, over the long run, metropolitan plans may provide an answer to concerns expressed about busing. Here I direct your attention to the center study conducted by my colleague, Diana Pearce, that finds significant housing desegregation taking place after school desegregation in these metropolitan plan communities. This was the pattern in communities as diverse as Racine, Wis.; Witchita, Kans.; Riverside, Calif.; and Charlotte-Mecklenburg, N.C.

Once you stop labeling the schools as black or white, people do not cluster around them in the same fashion. Real estate brokers have a harder time steering people to communities based on what the school looks like.

Finally, I think that desegregation has led to other gains for black and white children. It goes beyond what you can measure on standardized tests. Over the past 15 years, we have seen a lot of progress in this country. We have minorities entering the professions and the skilled trades on more than a token basis. We have minorities enrolled in universities and graduate schools on more than a token basis.

Much of this breakthrough, I would suggest to you, is attributable not only to the general crumbling of racial barriers, but to the fact that when you open up the school systems, you widen the horizons of minority youngsters.

In Boston, for example, a researcher hostile to desegregation, Dr. Armor in fact, had to concede that black students from all income levels who were enrolled in integrated suburban schools wound up in better colleges and universities than their counterparts who remained in segregated schools.

Like Julius Chambers, I grew up in a segregated society as well. I think that what we are talking about is something for white children as well as black children. My children who went to integrated schools are far better off in their understanding of the real world and in their ability to cope with it than I was having grown up in a segregated society.

CONCLUSION

In conclusion, what I am saying is if the committee takes the time to examine the evidence, to amass it, to look at it carefully, I believe it will come to the conclusion, as Senator Mondale's committee did in 1972, that the body of cases from *Brown* to the present represents sound constitutional jurisprudence and that desegregation, when it is properly implemented, is sound educational policy.

We are all concerned about our strength as a nation and our strength as a people. What we are talking about here is what we need to do to eliminate the stain of racial discrimination, which is one of the few things that mars that strength.

Once before in our history, we had made some progress. However, then the laws were dismantled and a Supreme Court Justice, Justice Bradley, said that the time had come for black people to cease being "special favorites of the law."

Now I think finally we have come to a point where we have begun to recover from that disaster in our history. We have made some progress in dismantling the racially dual society that was created to replace slavery in the country.

However, now we hear the echoes of the same views. I think it would be a tragedy if we in this country made the same mistake twice.

Thank you very much.

[The material follows:]

PREPARED STATEMENT OF WILLIAM L. TAYLOR

Mr. Chairman and Members of the Subcommittee:

My name is William L. Taylor and I serve as Director of the Center for National Policy Review, a civil rights research and advocacy organization located at Catholic University Law School. My interest and involvement in school desegregation issues spans a period of more than twenty-five years. In the 1950s, as an attorney with the NAACP Legal Defense and Educational Fund, I worked on several school cases that followed the Supreme Court's decision in Brown v. Board of Education. In the 1960s, as Staff Director of the U. S. Commission on Civil Rights, I supervised public hearings and studies on school desegregation issues including the 1967 report on Racial Isolation in the Public Schools prepared at the request of President Lyndon Johnson. Over the past ten years, I have served as counsel for black parents or city school boards in several lawsuits where the remedy sought in federal court was metropolitan in scope, including cases in Wilmington, Delaware; Indianapolis, Indiana; and St. Louis, Missouri. The Center has conducted research and published reports on a variety of school issues, including the most recent study, Breaking Down Barriers: New Evidence on the Impact of Metropolitan School Desegregation on Housing Patterns, written by my colleague Diana Pearce in November, 1980.

Because of this longstanding interest and involvement, I welcome the Committee's invitation to participate in these oversight hearings on school desegregation. Few issues have been the subject of so much public misinformation and confusion.

Some elected officials and community activists have centered attacks on desegregation on the use of busing, neglecting the fact that the real concerns of parents go far more to the quality of schools than to the means of transportation. Some journalists have concentrated their reports on a single moment in time--the conflict that frequently occurs when desegregation plans are first implemented, ignoring both the past and the unfolding story of how the plans work after they have been in operation for several years. Some academics continue to use the Brown decision as a playground for theories, often highly abstract, about the role of courts and government in dealing with social problems.

What is often neglected in all of this is children and their interests in attending public schools that are operated in conformity with the Constitution and that meet their educational needs.

While school desegregation is a subject that Congress has addressed with some frequency in recent years--often in last-minute riders to appropriations bills--there has been very little effort to develop information through the process of legislative investigations and hearings. The only comprehensive investigation that the Senate has ever done was conducted by the Select Committee on Equal Educational Opportunity, chaired by then-Senator Mondale, from 1970 to 1972. Those hearings and the Committee's report produced extremely useful information which should be tapped in any consideration of legislative measures today. But the Mondale Committee report is now eight years old and it would be essential, if Congress is again going to consider legislation, to develop a complete record on the many important developments that occurred during the 1970s.

Today, I would like to provide a brief overview on the current status of school desegregation in the courts and on what has been learned about the educational and community effects of plans that are in operation.[1]

1. Legal status. Contrary to suggestions that the courts have engaged in "sociological experimentation", school desegregation has been judicially required only when acts of intentional racial discrimination have been proven. The Supreme Court and virtually all lower federal courts have been consistent on this point from the Brown opinion through the most recent Supreme Court decisions in the Columbus and Dayton cases in 1979. The heart of the Brown case, in my view, was the right of black people "to exemption from unfriendly legislation...implying inferiority in civil society."[2] This fundamental point about the basis of Brown now is widely understood as applied to the state

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[1] Because this testimony was prepared on short notice, I ask the Committee's permission to file a supplemental statement for the record.

[2] The Court was quoting from Strauder v. West Virginia, 100 U.S. 303, 307-308 (1879). Similarly, in Bolling v. Sharpe, the companion case to Brown involving the District of Columbia schools, the focus was on the fact that governmentally-segregated schools were a racial classification not reasonably related to any proper governmental objective. 347 U.S. 497, 499.

mandated or authorized dual systems that existed in the South and Border states. The point is less widely understood about the school desegregation cases that have arisen in the North and West.

Yet from the Supreme Court's first decision involving the North in 1973 (Keyes v. School District No. 1 of Denver, 413 U.S. 189), through the decisions in Columbus and Dayton, it has insisted that desegregation will be ordered only where plaintiffs have proved "a current condition of segregation resulting from intentional state action..."[3] Any examination of the record and lower court findings in Northern cases where desegregation has been ordered would disclose a plethora of intentionally discriminatory practices by school authorities--racial gerrymandering, discriminatory site selection, segregative transfer policies, the racial use of optional zones, discriminatory teacher assignments--which over time have contributed to the establishment of a segregated system. Those who express puzzlement about how conservative federal judges could order what appear to be sweeping remedies need only examine the cases to learn that the judiciary has been faithful in performing its function--applying well-established principles of equal protection of the laws to the record evidence.[4]

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3. 413 U.S. at 205-206.

4. Several years ago, our Center prepared a chart listing the intentional violations found by the courts in major Northern cases. If the Committee believes it would be useful, we would be glad to update our compilation and submit it for the record.

In cases involving claims for inter-district or metropolitan relief, plaintiffs have faced an additional burden since the Supreme Court's decision in Milliken v. Bradley.[5] They are required to prove not only the existence of racial intent by public officials, but that the discriminatory acts had substantial effects throughout the metropolitan area. The courts have determined that this burden was not met in Detroit and Atlanta but that such inter-district violations were established in cases arising in Wilmington, Delaware and Indianapolis, Indiana.

The courts have exercised similar care in devising remedies for the constitutional violations they have found. They have operated under the equitable principle articulated in Swann, Milliken and other Supreme Court decisions that the scope of the remedy should be tailored to match the scope of the violation. Before ordering systemwide relief, that ordinarily requires substantial busing, courts have required a demonstration that the effects of the violation were significant and pervasive. Where the violations that have been found were only isolated, as in Dayton I [6], the Supreme Court has refused to sustain orders for systemwide relief. At the same time, the courts have recognized that purportedly neutral remedies such as "neighborhood assignment" may be woefully insufficient to cure the violation. In Swann and Keyes, the

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[5] 418 U.S. 717 (1974).

[6] 433 U.S. 406 (1977).

Supreme Court acknowledged that segregative school practices by public officials can have a profound influence on housing patterns, fostering racially segregated neighborhoods throughout a city or metropolitan areas. Even in these cases, however, the courts have drawn limits, based on time, distance and other factors, on the extent to which busing can be used as a remedy.

In addition to logistical limitations, the courts have also placed time limits on desegregation orders. In the Pasadena case [7], the Supreme Court indicated that the period allowed for active court supervision of the effort to "accomplish the affirmative duty to desegregate" and to eliminate official discrimination is a short one. Many lower courts interpret this to permit three to five years for requiring reassignments to maintain an integrated system, a brief period indeed to counteract the ingrained customs and attitudes fostered by decades of governmentally-imposed segregation.

In short, I believe that any careful review of the record of the federal courts in school desegregation since Brown will disclose that the judiciary has acted cautiously and prudently, disturbing the established order of segregated schools only where a convincing case of intentional discrimination has been made. If anything, if failing to come to grips with the major role, both historic and contemporary, that government has played in fostering conditions of racial separation in metropolitan

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7. Spangler v. Pasadena City Board of Education, 427 U.S. 424 (1976).

areas, the Supreme Court has yet to follow through completely on the principles established in Brown.

2. Educational impact of desegregation. Contrary to suggestions that "busing has been a failure", school desegregation plans involving busing have led to educational gains, have proved stable and have been accepted by the communities involved.

a) Desegregation has led to achievement gains. The most important current research on the links between school desegregation and achievement scores has been conducted by social scientists Robert Crain and Rita Mahard who analyzed carefully more than 100 case studies of desegregation. They found that in communities such as Sacramento, Fort Worth, Nashville, Charlotte-Mecklenburg and Louisville, the achievement scores of minority students increased significantly after desegregation. In only a handful of methodologically-flawed studies was there any indication of a decline in achievement among minority students. And no study has concluded that white students suffer academically from desegregation.

Crain and Mahard and other researchers have now gone beyond the question of whether school desegregation leads to achievement gains, to identify conditions under which it produces the best results.

In their most recent report, which became available last month, Crain and Mahard conclude that metropolitan or countywide plans, which inevitably entail substantial busing, have been the most successful in leading to achievement gains for minority children. While this finding contravenes the conventional wisdom, it should not be surprising. Metropolitan or county-wide plans, while requiring busing, facilitate the creation of a school system in which almost all classrooms consist of advantaged children, an educational environment which all researchers agree is most likely to foster gains for disadvantaged students.

The Crain-Mahard findings also are supported strongly by the results of the National Assessment of Educational Progress published last month. The Assessment reports major gains for black children in reading during the past decade [8], particularly black children in the Southeastern states. It was in the Southeast that school desegregation orders were implemented on a large scale during the 1970s and where the plans have been metropolitan or county-wide in character, because no boundary line divides city from suburban districts.

b) Metropolitan desegregation has been stable and has achieved community acceptance. A few years ago, a great deal of public attention was focussed on reports that suggested that efforts at school desegregation were self-defeating because white parents inevitably would move away from racially mixed schools. It turned out that the conclusions of the most-publicized report were based on data from big cities where school

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8. For nine-year old black children, for example, average scores increased by 9.9%, while the overall gain for nine-year olds was only 3.3%.

desegregation had never been ordered. Demographers are now in agreement that, while school desegregation may have a one- or two-year impact, declines in the enrollments of central city schools stem far more from the continuing suburbanization of whites, a movement of more than 30 years' standing, than from desegregation orders.

A more accurate measure of the workability of desegregation plans can be taken in the South where plans have been metropolitan or systemwide. In districts such as Tampa-Hillsborough, Charlotte-Mecklenburg and Nashville-Davidson, these plans, involving extensive busing, have been in effect for about ten years and they have proved remarkably stable and successful. Their stability may be traced to the fact that, as I have noted, county-wide plans permit the establishment of classrooms consisting primarily of advantaged students. Despite the furor over busing, most parents are far less concerned about how their children get to schools than about the quality of their education. In many of the communities I have mentioned, parents and educators have worked hard and successfully to improve the quality of education after desegregation.

Certainly most parents, both black and white, would prefer that desegregation be accomplished without busing if that were possible. But a more concrete expression of public attitudes is contained in the recent New York Times/CBS News opinion poll showing that most people in communities that have undergone desegregation react favorably to the experience after the plans have been in effect for three years.

Indeed metropolitan plans may provide a long range answer to the concerns expressed about busing. Our Center's recent report, Breaking Down Barriers, contains a good deal of evidence that when public schools are desegregated on a metropolitan basis, the process actually leads to increased residential integration rather than to "white flight". This was the pattern in communities as diverse as Racine, Wisconsin; Witchita, Kansas; Riverside, California; and Charlotte-Mecklenburg, North Carolina.

As the courts have recognized, when schools are labelled by official practice or custom as "black" or "white", families tend to cluster around them on the same racial basis. Once schools are integrated, real estate brokers are less able to steer home-seekers along racial lines.

As housing integration increases, the need for busing declines.

c) Desegregation has led to other gains for both black and white children. The gains associated with desegregation go far beyond what can be measured on standardized tests. Over the past 15 years many more black students have enrolled in universities and in some graduate fields. Blacks have entered the professions and skilled trades in more than token numbers. Much of this breakthrough is attributable to the general crumbling of overt racial barriers, but some can be traced to the ways desegregated schools widen the horizons of minority youngsters. In Boston, for example, a researcher hostile to desegregation had to concede that black students from all income levels who were enrolled in integrated suburban schools wound up in better colleges and universities that their counterparts who remained in segregated schools in the city.

High schools, as D. W. Brogan once observed, are places "where students instruct each other on how to live in America." In central city schools, many students learn only the survival skills of the ghetto. In desegregated schools, both black and white children learn the skills of mainstream America.

Well-off white youngsters are victims of racial isolation as well. When they attend segregated schools, their learning experiences are constricted and a large part of the world they will have to function in is shut out. It would be interesting to contrast the experience of white students in segregated suburban schools with those in integrated schools such as Seward Park and Newtown in New York City where students use the whole city as their learning laboratory and enrich each other with knowledge of different languages and cultures.

Conclusion. In sum, Mr. Chairman, if the committee is able to take the time to amass the evidence and to examine it dispassionately, I believe it will conclude as did the Mondale Committee in 1972 that the body of cases from Brown to the present represent sound constitutional jurisprudence and that desegregation when properly implemented is sound educational policy.

Most people would agree, I think, that one of the few things that mars our strength as a nation and as a people is the stain of racial discrimination. Once before in our history, when some progress had been made, the laws that had spurred the progress were dismantled, with the observation by Justice Bradley that:

> When man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitant of that state, there must be some state in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws.9/

Now, almost a century later, when we have made some progress in dismantling the racially dual society that governments created to replace slavery, there are echoes of the same views. It would be a tragedy if we made the same mistake twice.

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9. Civil Rights Cases, 109 U.S. 3, 25 (1883).

APPENDIX A
(TO TESTIMONY OF WILLIAM TAYLOR)

Desegregation and Achievement

Court orders for desegregation are based on the need to remedy discriminatory government practices that violate the Constitution, not on social science judgments about the relationship of segregation or desegregation to achievement scores. Nevertheless, any assessment of the effectiveness of court-ordered desegregation plans properly takes into account the effect of the plans on the academic performance of children.

Contrary to sweeping charges that desegregation has led to a decline in the quality of public education, the weight of the evidence demonstrates that plans, including those involving substantial busing, have led to significant achievement gains for minority students and have not harmed the performance of white students.

The first review of literature regarding the effect of desegregation on achievement scores was done by Nancy St. John in 1975.[1/] While she found that more studies showed improvement in black achievement scores, she declined to draw a definite conclusion because of the uncertain quality of many of the studies. Meyer Weinberg, in 1977 [2/], reviewed substantially the same set of studies. He went further than St. John, concluding that desegregation did raise minority achievement scores. Krol (1978) also found a positive effect of desegregation on minority

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1. N. St. John, School Desegregation: Outcomes for Children (1975).
2. M. Weinberg, Minority Students: A Research Appraisal (1977).

achievement.

Two recent studies by Robert L. Crain and Rita E. Mahard [3] are particularly valuable. The first study, Desegregation and Black Achievement: A Review of the Research (1978), reviewed 73 studies, including 32 studies previously reviewed by Weinberg and St. John.[4] They concluded that overall, desegregation did raise black students' achievement scores. While 40 studies showed significant gains, only 12 showed declines. Further, the authors pointed out that many of the studies showing declines were weaker methodologically.[5]

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[3] Robert L. Crain is a Senior Social Scientist at the Rand Corporation. Rita E. Mahard is an Assistant Social Scientist at the Rand Corporation and the University of Michigan.

[4] This chart sets out the findings of the respective authors in reviewing the achievment literature. Crain and Mahard noted that in choosing the 41 studies they reviewed separately, they purposely included more studies with negative results. This was a result of statistical methods which resulted in Crain and Mahard interpreting some small differences as negative rather than as zero.

		Reviewer of Studies				
		C + M[a]	St. J.[b]	W[c]	W + St. J.[d]	Total
Effect:	Positive	19	8	7	6	40
	Zero	12	1	3	5	21
	Negative	10	1	0	1	12
Total		41	10	10	12	73
% Positive		46%	80%	70%	50%	55%

[5] The best design is a randomized experiment. Here, desegregated and segregated students are chosen by the flip of a coin. Almost as effective is a design where black students in segregated schools are used as a control group, and both the desegregated and segregated students are pre-tested before desegregation begins. Weaker designs are those that have no control group, comparing black achievement scores to national norms, black students in the same grade a few years earlier, or white achievement scores. The general decline in nationwide achievement and the relationship between black and white achievement at different grade levels create serious problems in these studies.

For example, a study done in Waco, Texas that found a negative impact on achievement used a sample group of only 55 students who were not matched as to age, grade and sex. Further, several studies not showing significant achievement gains were conducted during the first year of desegregation, when students are still adjusting to the impact of attending a new school or adapting to a new educational environment. Studies done after the second year tend to show more positive outcomes.

The second Crain and Mahard treatise, released in April of this year is entitled Some Policy Implications of the Desegregation-Minority Achievement Literature. Here, the authors have collected all the available studies (93) on the effects of desegregation on black achievement [6], and removed extraneous effects of differences in methodology. Thus, they were able to arrive at some general conclusions regarding how black achievement scores are affected by desegregation and under what conditions the educational benefits of desegregation are greatest.

The studies reviewd by Crain and Mahard involved minority students in schools that have already been desegregated, as opposed to examining black achievement scores in general.[7]

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6. There has been very little work on the achievement effects of desegregation for Hispanic students, but what research is available shows a similar pattern as the studies on black achievement. See Morrison (1972) and Coleman, et al., (1966).

7. Studies examining black achievement in general fail to distinguish between "natural" integration and integration occuring as a direct result of a desegregation plan.

Without exception the studies concluded that desegregation has no adverse effect on the achievement scores of white students. This finding includes districts in which substantial busing is utilized to achieve desegregation. As to minority students, Crain and Mahard found that not only did achievement scores rise for minority students in desegregated schools, but that on the average, their IQ scores rose an average of 4 points.[8]

The authors also sought to identify attributes of desegregation plans that have an impact on achievement. First, they conclude that the age at which desegregation begins is important. Students desegregated in kindergarten and first grade showed consistently higher achievement gains than those desegregated in later grades. Every sample of students desegregated at the kindergarten level showed positive achievement gains, while students desegregated for the first time in secondary school showed gains in about half the samples.

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8. The mean IQ score was 91. A four point gain would halve the gap between 91 and 100, a "normal" IQ. This finding also challenges the belief that IQ scores are an indicator of innate intelligence.

THE PROPORTION OF STUDIES SHOWING POSITIVE DESEGREGATION OUTCOMES, BY GRADE AT WHICH STUDENTS WERE DESEGREGATED AND TYPE OF RESEARCH DESIGN

Type of Design	Grade of Desegregation					Raw Average
	K	1	2-3	4-6	7+	
Random experimental	100%(1)	100%(8)	71%(7)	60%(5)	--	81%(21)
Longitudinal	100%(2)	73%(11)	46%(46)	62%(39)	69%(29)	59%(127)
Cohort comparison	100%(5)	78%(23)	56%(25)	40%(37)	45%(11)	56%(101)
Norm-referenced	100%(3)	0%(2)	43%(14)	37%(19)	0%(8)	35%(46)
Column average	100%(11)	77%(44)	50%(92)	49%(100)	52%(48)	56%(295)

In terms of long-term achievement gains, this finding assumes major importance. If the rate of achievement gain persists throughout the child's school years, the authors say, a minority child desegregated from the start would gain nearly 2 grade levels by the time she/he graduated from secondary school.[9]

Another factor relating to achievement gains is the comprehensiveness of the desegregation plan. Piecemeal plans that merely re-assign students from one school to another burden the students with making the adjustment on their own. Researchers have pointed out the importance of in-service training for teachers, administrators, school boards and supporting staff. Training programs that help teachers to recognize their own

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9. This calculation takes into account the fact that the rate of achievement does not increase as the student moves from the lower grades to secondary school, but rather remains constant.

biases, give them knowledge of different groups' history and culture and prepare them for teaching more heterogenous classes have a positive impact on minority achievement, and on the overall effectiveness of the plan.[10]

One of the most important conclusions reached by Crain and Mahard is that the analyzed studies involving metropolitan or county-wide desegregation plans showed stronger gains than other studies. Studies of areas involved in metropolitan or county-wide plans included Hartford and New Haven, Connecticut; Newark, New Jersey; Nashville-Davidson County, Tennessee; Rochester, New York; and Louisville-Jefferson County, Kentucky. Every one of these studies showed sizable achievement gains for minority students. In Louisville-Jefferson County, black students' overall performance rose at a rate double that of white students.

EFFECT OF DESEGREGATION, BY TYPE

OF SCHOOL DISTRICT SETTING

	Mean Effect (std. dev.)	Number of Samples
Central city	. .065	(97)
Suburb	.021	(76)
County-wide	.119	(31)
Metropolitan	.144	(30)

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10. See Gay (1978), Orfield (1975), Forehand, et al., (1976) and Lincoln (1976).

One reason for the higher achievement gains in areas involved in metropolitan and county-wide plans is that these forms of desegregation represent the most complete form of socioeconomic integration, which has been cited by almost all authorities as an important factor in raising minority students' performance. See Coleman, et al., Equality of Educational Opportunity (1966) and Mosteller and Moynihan, On Equality of Education Opportunity, Random House (1972). The National Assessment of Educational Progress also noted considerable progress for black children in reading during the past decade, especially in the Southeast. This reflects the fact that large numbers of desegregation orders were implemented during the 1970s. Many of these plans are metropolitan in character, as no boundary lines separate urban and suburban districts.

Conclusion

From the available research, it is clear that there is a positive relationship between desegregation and improvements in minority achievement scores, and that desegregation has no detrimental effects on the scores of white children.

Especially significant is the positive relationship between metropolitan desegregation plans and the rise in black children's achievement scores. Legislation that would curtail the power of courts or other agencies to order inter-district desegregation or to use busing as a tool for desegregation would adversely effect the plans that have been most effective in improving academic performance.

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APPENDIX B
(TO TESTIMONY OF WILLIAM TAYLOR)

School Desegregation and White Flight

Critics of school desegregation argue that it is self-defeating, as it leads to white flight and precipitates a significant drop in white enrollment in the public schools. ames Coleman, a prominent sociologist, has been a particularly vocal critic. His 1975 study, Recent Trends in School Integration, is often cited in support of this proposition. When Colemans' report is examined together with other research on the topic, however, the results point to a quite different conclusion.

I. Large Cities. The claim that desegregation leads to white flight is limited to school desegregation that occurs in large cities with high proportions of minorities that are surrounded by virtually all white suburbs. Even in this situation, the claim is largely inaccurate. White suburbanization preceded school desegregation by several decades. It stems from many causes, including record levels of suburban housing construction; the movement of urban jobs to suburban facilities; and discriminatory housing practices limiting minority access to suburban housing. [1] White suburban out-migration persists in most large cities whether or not a desegregation plan has been implemented. Thus, in 1979 in Boston, the site of the most intense recent resistance to a desegregation plan, the decline in white enrollment was less than one-third the level in Chicago, which has never experienced court-ordered desegregation.[2] Several factors cast doubt on Coleman's finding even as limited to large cities.[3] Coleman defined school desegregation as "any situation where there happens to be a significant number of black and white students in the same school at the same point in time." Thus, many of the cities used in his study had never operated under any desegregation plan. In fact, a New York Times Research study of the twenty largest cities in the Coleman study failed to find any court-ordered desegregation in any of those cities during the 1968-1970 period he studied.[4]

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[1] See Gary Orfield, White Flight Research: It's Importance, Perplexities and Possible Policy Implications. (1975) Delivered at the Brookings Institution Symposium on School Desegregation and White Flight, August 1975. For a comprehensive historical analysis of federal housing policy see Martin Sloane, Federal Programs and Equal Housing Opportunity, from A Staff Report of the Subcommittee on Constituional Rights of the Senate Judiciary Committee. (1976)

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2. Gary Orfield, Voluntary Desegregation in Chicago, A Report to Joseph Cronin, State Superintendent of Education (1979). In Los Angeles, cited by David Armour as the principal example of desegregation resulting in white flight, the rate of loss of white first graders during the first year of the desegregation plan was the same as Chicago during the same year. The overall rate of white student loss was higher, however, during the first year of the plan.

3. Coleman actually issued four different versions of this report, which came to somewhat different conclusions. Many of his colleagues were concerned that the statements Coleman made to the media went beyond his findings. They were also concerned with the methodological strength of the reports and the frequency with which Coleman altered his findings. Green and Pettigrew, School Desegregation and White Flight: A Reply to Professor Coleman (1975).

4. Christine H. Rossell, School Desegregation and White Flight, Political Science Quarterly, Volume 90, No. 4, Winter, 1975-76.

Subsequent studies by Christine H. Rossell and Reynolds Farley examined the effect of school desegregation on pupil enrollment. Although their data base was similar to Colemans' 5/ their conclusions were significantly different.

Looking at large cities where desegregation had been ordered, they found that although desegregation had a limited impact on white enrollment during the first year, 6/ by the third year of the plans' operation, the rate of decline in white enrollment had returned to pre-plan levels, and in some cases, was below pre-plan levels.

TABLE 2 *Change in Percentage White for Four Desegregation Groups and a Control Group Controlling for City Size*

Group	*4 Years*	*3 Years*	*2 Years*	*1 Years*	*0 Years*	*1 Years*	*2 Years*	*3 Years*	*Signif Level*	*Average Pre-series*	*Average Post-series*
Large cities (> 500,000)											
High desg	-1.3	-.7	-2.8	-.4	-2.3	-2.3	-1.4		N.S.	-1.0	-2.0
Med. desg.	-4.0	-1.0	-1.1	-.9	-1.1	-1.1			a	-1.8	-1.1
Low desg		-1.5	-1.7	-3.6	-.8	-.9	-.4		N.S.	-2.3	-.7
Control	-2.1	-1.3	-1.3	-1.9	-1.7	-1.6			N.S.	-1.6	-1.7

The above chart, from Rossells' study, charts the rate of white enrollment loss before and after desegregation in cities of 500,000 or more. High desegregation represents cities where more than 20% of all students were reassigned; medium, between 5 and 20%, and low, less than 5%. Cities with no desegregation plans were used for the control group.

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5. Rossell expanded substantially on Coleman's data by collecting data directly from each school district wherever possible.

6. Rossell notes that increases in white flight usually occur just before the implementation of a school desegregation plan, indicating that this is a result not of problems experienced, but of the fear of problems.

Robert L. Green and Thomas F. Pettigrew confirmed both Rossell's and Farley's conclusions in a study which examined Coleman, Rossell and Farley and also included their own findings.[7] Pettigrew and Green found that the cities on which Coleman based his conclusion that white flight in large cities is a result of school desegregation were not at all representative of large cities that had undergone desegregation. Coleman, in fact, omitted Denver, Colorado; Miami, Jacksonville and Fort Lauderdalte, Florida.
All are large urban systems which had undergone school desegregation. Using a more representative sample of cities, Green and Pettigrew arrived at the same conclusions as did Rossell and Farley: that while white enrollment in the public schools does drop at a greater rate during the first year of a desegregation plan, this effect is generally short-lived.

II. Small and Medium-Sized Cities. It is also clear that the white flight phenomena does not apply in small and middle-sized cities. Cities such as Fort Wayne, Indiana; Stamford, Connecticut; Sacramento, California; and Ann Arbor, Michigan all retained a rate of white enrollment consistent with pre-desegregation years. Berkeley, California actually experienced an increase in white enrollment post-desegregation.

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7. Robert L. Green and Thomas F. Pettigrew, Public School Desegregation and White Flight: A Reply to Professor Coleman. Prepared for United States Civil Rights Commission, Washington, D. C., December 8, 1975.

In Pontiac, Michigan, where nearly one-half of all black and white students were reassigned, and despite community conflict surrounding desegregation, by the second year of the plan the rate of white enrollment loss was lower than it was two years prior to desegregation.[8]

TABLE 2 *Change in Percentage White for Four Desegregation Groups and a Control Group Controlling for City Size*

Group	*-4 Years*	*-3 Years*	*-2 Years*	*-1 Years*	*0 Years*	*1 Years*	*2 Years*	*3 Years*	*Signif Level*	*Average Pre series*	*Average Post series*
Med cities (100,000-500,000)											
High desg	-1.3	-1.6	-.3	-1.3	-2.0	-1.8	-2.2	-.8	NS	-1.1	-1.7
Med desg	-.8	-1.3	.6	-1.2	-1.2	-2.1	-1.1	-1.1	NS	-1.0	-1.1
Low desg	-1.3	-2.5	-1.8	1.3	-1.3	-1.6	-1.4	1.3	NS	1.7	1.4
Control		-1.0	-2.0	-2.1	-2.4	-1.8	-1.3	-1.3	NS	-1.7	-1.7
Small cities (< 100,000)											
High desg	-2.2	-3.3	-4.8	-1.8	-3.6	1.2	1.1		NS	3.0	-1.9
Med desg	2	.7	-1.2	.2	.9	.3	.9		NS	-.6	-.7
Low desg			-.6	-.5	-.7	-1.5	-1.5		a	.6	-1.2
Control					-2.2	-1.9	-1.6	-1.7	a	a	1.7

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III. Metropolitan and County-wide Plans. Pettigrew and Green, and others have also found that districts involved in metropolitan or county-wide school desegregation plans, which inevitably involve substantial busing, do not experience desegregation-related white flight. When a desegregation plan was implemented in Tampa-Hillsborough County, Florida, there was no white flight, despite the predictions of opponents to the plan. Private "white flight academies" soon closed, due to lack of enrollment.[10] Rossell's study also showed that cities

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8. For a complete list of all the cities used in Rossell's study, see Attachment A.

9. See Page 3 for chart explanation.

10. Time Magazine, September 19, 1979, p. 76.

under metropolitan or county-wide plans such as Racine, Wisconsin and Riverside, California experienced a drop in the rate of white enrollment loss after desegregation.[11/]

In fact, far from leading to white flight, evidence shows that metropolitan and county-wide desegregation may lead to increased residential integration. Dr. Diana Pearce, in a 1980 study [12/], examined seven pairs of cities matched for population, geographic location and the percentage of minority enrollment in the public schools. The only difference between each pair was that one city had experienced metropolitan or county-wide desegregation for a minimum of five years, while the other half had no metropolitan desegregation.

In each pair of cities, substantially greater reductions in housing segregation were found in the cities which had experienced metropolitan or county-wide school desegregation. In contrast to the short term effect of white flight, this trend toward increased residential integration was found to be cumulative over the years. In Riverside, California, for example, after fifteen years of metropolitan school desegregation, only four of the twenty-one elementary schools required busing; the remainder of the school attendance zones had become sufficiently integrated residentially so that busing was no longer necessary

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11. See Attachment A.

12. Breaking Down Barriers: New Evidence on the Impact of Metropolitan School Desegregation on Housing Patterns.

to maintain racial balance in the public schools.

The study suggests several factors which explain this result. First, eliminating segregated, racially identifiable schools in an entire metropolitan area removes a means of facilitating segregative housing choices.[13] Second, when schools are desegregated on a metropolitan basis, no matter where one lives, one's children will attend desegregated schools. Further, in some desegregation plans, integrated neighborhoods become the only neighborhoods that are exempt from busing and retain their neighborhood schools. This exemption provides a powerful incentive for both minority and majority families to create stable, integrated neighborhoods. Louisville-Jefferson County, Kentucky operates under a metropolitan desegregation plan which exempts blacks who move into an area where they are a racial minority from busing. In conjunction with counselling given to low-income families after the plan went into effect, many black families have moved from the city to white suburban neighborhoods. Hundreds of black students have been automatically exempted from the transportation aspects of the plan over the past 5 years.

Additionally, as enough black families move into a neighborhood to improve the racial balance of a given school

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13. In fact, a survey of real estate agents in the cities showed that in the cities with metropolitan desegregation, brokers were more willing to show both black and white customers housing in all areas of the city, which also helps create integrated neighborhoods.

attendance zone, it is possible for the entire school to be exempted from busing, enabling all the students, black and white, to attend their neighborhood school.[14]

When coupled with the finding that minority children's achievement scores were found to rise the most in districts with metropolitan desegregation [15], it becomes clear that metropolitan and county-wide school desegregation plans may be an effective, long range tool to achieve integrated schools, stable integrated neighborhoods and better educated children in both large cities and more rural areas.

Conclusion

Extensive social science evidence on school desegregation and white flight shows that:

1) In large cities with substantial minority populations, a drop in white enrollment may follow a school desegregation order during the first year, but in succeeding years the rate of white pupil loss usually returns to pre-desegregation levels. The major causes of white suburbanization have little to do with school desegregation and the rate of white flight is not different in cities that do not have court-ordered desegregation.

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14. Staff Report 80-1, Kentucky Commission on Human Rights, Frankfort, Kentucky.

15. See Crain and Mahard, Some Policy Implications of the Desegregation-Minority Achievement Literature (1981).

2) In small and medium-sized cities, there is little or no effect of desegregation on white enrollment loss.

3) Districts that have metropolitan and county-wide desegregation plans do not experience white flight or white pupil loss as a result of desegregation. Indeed, these types of plans have led to increased residential integration.

Proposed legislative findings that school desegregation remedies required busing lead to white flight are unsupported by the evidence. To the contrary, legislation that would curtail the use of busing as a remedy would eliminate metropolitan plans that have proved stable and have led to residential integration.

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ATTACHMENT A

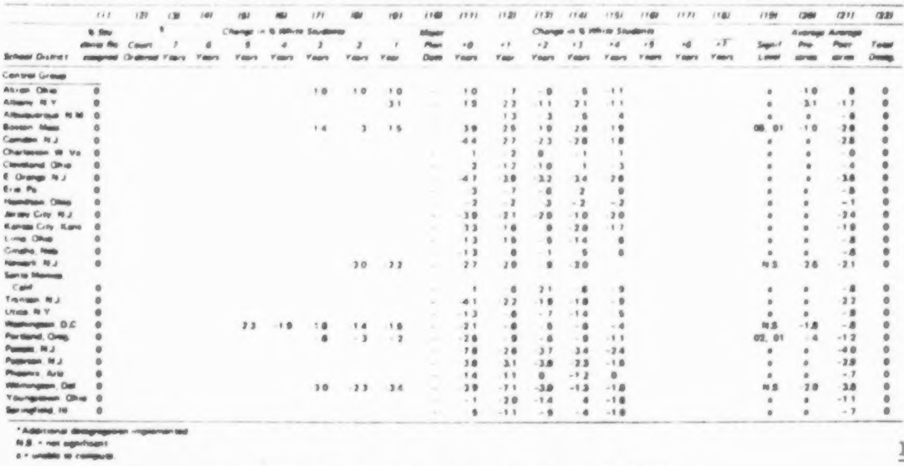
APPENDIX 2 CHANGE IN PERCENTAGE WHITE FROM THE PREVIOUS SCHOOL YEAR COMPUTED FOR EACH YEAR BEFORE AND AFTER SCHOOL DESEGREGATION

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)	(17)	(18)	(19)	(20)	(21)	(22)
				Change in % White Students						Major		Change in % White Students								Average	Average	
School District	% Students Reassigned	Court Ordered	7 Years	6 Years	5 Years	4 Years	3 Years	2 Years	1 Year	Plan Date	+0 Years	+1 Year	+2 Years	+3 Years	+4 Years	+5 Years	+6 Years	+7 Years	Signif. Level	Pre-series	Post-series	Total Deseg.
Pasadena, Calif.	38.48	yes		-2.7	-1.6	-1.9	-2.1	2.0	-2.4	1970	4.2	4.5	2.5*						.01 .05	1.2	3.7	100.80
Pontiac, Mich.	83.47	yes		-1.3	-1.0	3.0	-3.1*	-1.7	2.4*	1971	-5.4	.4							.02 .02	2.1	2.9	87.08
Berkeley, Calif.	57.72					-2.2*	-2.2	.7	-1.8	1968	-2.2	-.6	.8	.7	.9				N.S.	.9	.3	66.37
Wichita, Kans.	44.38			*	-.8*	-.4	.4*	1.0*	1.0*	1971	-1.3	1.4							N.S.	.7	1.4	56.83
San Francisco, Calif.	42.48	yes			-2.9	-1.2	0	4.1	.2	1971	-3.0	-2.1*							N.S.	1.7	2.6	46.56
Ft. Wayne, Ind.	34.60				-.4	.5	1.6	.2	1.1	1971	.8	1.0							N.S.	.7	.9	34.00
Waukegan, Ill. (el Sch'sl)	31.72	yes				-1.3	3.5	7.8	1.1	1968	1.8	-1.9	1.1	-1.0	1.9				N.S.	3.4	1.5	31.72
Denver, Colo.	24.64	yes				-1.3	1.4	-1.5	.5	1968	1.5	2.4*	-1.4	2.0*					N.S.	-1.2	1.8	29.77
Providence, R.I.	24.10									1967		-2.0	.2	-.2*	-1.7*	-1.0			a	a	-.9	36.00
Riverside, Calif.	21.40							.7	-.6*	1966	-1.5	1.2*	.9	2.2*	-1.0	-1.4	1.5		N.S.	.1	-1.1	38.20
Las Vegas, Nev.	19.24	yes				.3	.6*	.6*	0	1972	-.8								a	-.2	-.8	30.06
Evansville, Ind.	15.77	yes		-.1*	-2.2	.3	.1	1.2*	-.3*	1972	.7								a	.8	-.7	29.57
Muncie, Ind.	15.10					.1	.9	2.8	1.9	1972	.3								a	.1	.3	15.10
Stamford, Conn.	13.20				-2.8	-1.3*	.8	-1.8*	-1.8	1970	1.5	.9	1.5						N.S.	1.7	1.3	21.42
Niagara Falls, N.Y.	11.76						*	-.4*	-.6	1970	-1.3	-.5	.7						N.S.	-.5	-.8	30.26
Sacramento, Calif.	11.10	yes						*	1.3	1966	.2	1.2	-.3*	-1.0	-1.1	-1.1	-1.0		a	1.3	.5	19.88
Oklahoma City, Okla.	10.82	yes						2.2	1.1	1968	1.6	-4.9	-1.2*	-.4	-1.8				N.S.	1.7	1.9	11.50
Saginaw, Mich.	9.60					7.6	-.5	-.6	2.3	1972	2.2								a	1.5	2.2	9.00
Grand Rapids, Mich.	9.40				a					1968	-3.1	-.8	-.2	1.8	-2.2*				a	a	1.8	10.16
Springfield, Mass.	9.10					-1.8	1.8	.9*	3.7*	1968	-1.3	-1.9	2.7	2.2	2.0*				N.S.	1.6	-2.0	23.06
Ann Arbor, Mich.	9.00								-.5	1965	-.1	-.1	.9	-2.3	-.6	.8	-1.1	-1.2*	a	.5	-.9	15.48
Lexington, Ky.	8.91									1967		.2	0	.4*	.3	.4			a	a	.7	9.66
Baltimore, Md.	7.92			6.2	-1.6	4.0	-1.0	-1.1	-.9	1971	-1.1	-1.1							N.S.	2.5	-1.1	7.92
Tulsa, Okla.	7.83	yes		-.1	-.2	.4	4.8	-.1	.6*	1971	-.5*	-1.9*							N.S.	-1.0	-1.2	14.38
Peoria, Ill.	7.83									1968	-.8	-.9*	-1.0*	-1.1*	-1.4*				a	a	-1.0	15.86
Cambridge, Mass.	7.30		-.6	0	-.1	-1.8	0	-1.2	-.9	1972	.9	2.0							N.S.	-.7	.6	7.30
Lansing, Mich.	7.18					.2	.6	-1.1	-2.2*	1968	.7	-1.8*	-1.4	-2.1*					N.S.	-1.0	1.5	22.54

APPENDIX 2 CHANGE IN PERCENTAGE WHITE FROM THE PREVIOUS SCHOOL YEAR COMPUTED FOR EACH YEAR BEFORE AND AFTER SCHOOL DESEGRATION (CONT.)

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)	(17)	(18)	(19)	(20)	(21)	(22)
				Change in % White Students						Major		Change in % White Students								Average	Average	
School District	% Students Reassigned	Court Ordered	-7 Years	-6 Years	-5 Years	-4 Years	-3 Years	-2 Years	-1 Year	Plan Date	+0 Years	+1 Year	+2 Years	+3 Years	+4 Years	+5 Years	+6 Years	+7 Years	Signif. Level	Pre-series	Post-series	Total Deseg.
Racine, Wisc.	6.80							-1.1*	-.4*	1967	.5	-.4	-.7*	-.8	-.1	-.9			N.S.	-.8	-.6	12.30
Tacoma, Wash.	6.50						-.7	-.7	-.3	1968	-1.4*	-.6*	-.9	.9*	-.1				N.S.	-.6	-.8	9.44
San Bernardino, Calif.	5.10						-.9*	-.1	-.7	1970	.8	-1.3	-.5						N.S.	-.6	-.9	7.10
Minneapolis, Minn.	4.90			-.6	.4	-1.5	-1.0*	1.3	-1.0*	1971	-1.5	-1.3							N.S.	-1.0	-1.4	11.18
Waterbury, Conn.	4.80							-2.4	-1.3	1970	.9	-1.7	-.5						N.S.	-1.9	-1.0	4.80
Rochester, N.Y.	4.30			-2.4	-2.8	-1.6	-3.0	-2.8	-2.4*	1971	-3.3	-3.1							N.S.	-2.4	-3.2	5.10
Seattle, Wash.	4.14		-1.0	-1.1*	-1.8	.6	.8*	-.9	-1.6	1971	-1.5	-1.1							N.S.	-1.1	-1.3	10.25
Dayton, Ohio	3.20								-.6	1969	-1.1	-1.4*	-2.0	-2.0					a	-.6	-1.6	3.98
Buffalo, N.Y.	3.20									1967	-2.5	-4.0*	-1.3*	-1.3*	-1.2	-2.2			a	a	-2.1	5.79
Warren, Ohio	2.80								-.5	1969	-.7	-.3	-.5	-.9					a	-.5	-.8	2.80
St. Paul, Minn.	2.57									1965		*	*		-1.0	-.5	.7	-.5	a	a	1.3	6.77
South Bend, Ind.	2.90							-1.3	-1.0	1970	0	-1.2	-.9		(less decline than expected)				N.S., .08	-1.2	.7	3.80
Rockford, Ill.	2.40								.7	1969	.9	1.3	-.6	-1.1					a	.7	-.5	2.40
Flint, Mich.	2.39						3.5	-1.5*	-2.0	1971	-2.8	-1.7*							N.S.	-2.3	-2.3	3.08
Syracuse, N.Y.	2.20						-2.6	-1.4	-1.7*	1967	-1.9	-1.8*	-1.7	-2.0	-1.7	-2.0*			N.S.	-1.9	-1.9	3.65
Colorado Springs, Colo.	2.10							.4*	-.3	1971	-.1	-.2							a	.1	-.1	2.30
Indianapolis, Ind.	2.02	yes			-1.3	-1.0	-.2	-1.4	-1.7	1970	-1.1	-1.9*	-1.7*						N.S.	-1.1	-1.5	3.06
New York, N.Y.	1.78				2.0	-1.9	-1.8	-1.6	-2.2	1964	-2.6	-2.9*	-2.0*	-3.0*	-2.9*	-3.3*	-2.3*	-1.4 -1.3	.02 N.S.	-1.9	-2.4	7.67
Pittsburgh, Pa.	1.44							-.3	-.5*	1968	-1.7	-.5*	-.5*	-.4	-.8	-.8*			N.S., .07	-.4	-.8	3.18
Toledo, Ohio	1.20								-4.3	1969	-.5*	.2	-1.0*	-.2					a	-4.3	-.4	1.37
Waterloo, Iowa	1.91							-.6*	-.4	1971	-.6	-.4							a	-.5	-.5	2.25
Gary, Ind.	1.30									1967		-2.2	-1.6	-1.3	-2.4	-1.5*			a	a	-1.8	1.64
Milwaukee, Wisc.	1.10		*			-.3	-2.4	-.3	-2.5	1972	-1.9								a	-1.4	-1.9	2.02
Louisville, Ky.	.83					-.9	-1.2	-1.0	-.5	1972	-2.2								a	-1.9	-2.2	.83
Des Moines, Iowa	.82							*	0*	1969	-.1	-.4	-.3	-.6					a	0	-.4	1.10
Los Angeles, Calif.	.66						.2*	-1.5	-1.8*	1971	-1.6	-1.5							a	-1.0	-1.6	1.56
E. St. Louis, Ill.	.29									1967		-3.7	-2.5*	-4.2	-4.3*	-4.4			a	a	-3.8	.73
Kansas City, Mo.	.26					2.4	-1.9	-2.7*	-1.6	1969	-1.8	-1.6	-1.9	-2.3*					N.S.	-2.1	-1.9	.44
Detroit, Mich.	.25					-4.5	-1.8	-1.7	-1.9	1967	-1.3	-1.9	-2.8	-2.0*	-1.2*				N.S.	-2.5	-1.8	.26
San Diego, Calif.	.19							-1.2	-2.0	1967	-5.6	.1	-.5	-.2	-.4	-1.3			N.S., .01	-1.6	-1.3	.19
Chicago, Ill.	.17						-1.4	-1.4	-4.9	1969	-3.7	-1.6*	-1.5*	-2.0	-1.8*				N.S.	-2.5	-2.1	.46
Philadelphia, Pa.	.02		-2.0	-3.0	-1.0	-3.3	-1.4	-.9	-1.1	1972	-.1								a	-1.8	-.1	.02
Hartford, Conn.	.01						-3.8	-3.7	-2.5	1966	-3.8	-4.7	-3.7	-1.9	-2.3				N.S.	-3.3	-3.2	.01

APPENDIX 2 CHANGE IN PERCENTAGE WHITE FROM THE PREVIOUS SCHOOL YEAR COMPUTED FOR EACH YEAR BEFORE AND AFTER SCHOOL DESEGRATION (CONT.)



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16. Rossell, Desegregation and White Flight (1975).

Mr. **Markman**. Thank you very much, Mr. Taylor.

Again, we are very sorry that the Senators have had a number of conflicts this morning and that we have had to delay the hearing on several occasions.

I wonder if we could now have each of the panelists respond to what they have heard from the other panelists and perhaps put together a summary statement. Then perhaps Senator Thurmond's staff and myself might have a question or two.

Professor Glazer, would you have any thoughts on what the other panelists have stated?

Mr. **Glazer**. There is no question this has become an extremely divisive issue. I think there are all sorts of attributions of ill-motive possibly on both sides at this point. I think the reference to the dismantling of Reconstruction is totally inappropriate to the discussion of the issue we are talking about today.

I think integration and the advance of black people has progressed in many ways. I do not think that the increase of blacks in professional schools and in colleges that Mr. Taylor referred to has anything to do with the desegregation of schools. Conceivably, it would have progressed better if there had been less disruption of education.

I think, too, that the movement of blacks into suburbs as their income grows, their joining in black flight along with white flight, which is now as sharp a feature of the central cities in the 1980's as white flight was in the 1970's, produces integrated schools in the suburbs without the need for mass busing. It increasingly produces school integration.

There have recently been a series of articles in the Boston Globe and the Washington Post on that kind of integration. That kind of integration also occurs in a way which meets with the approval of both blacks and whites generally because there is a commitment to the neighborhood school.

In the paper that was done for Mr. Taylor's center by Diana Pierce, it is acknowledged that there is commitment to neighborhood schools by people, quite independent of their racial character, by blacks and whites. In fact, she makes the point on pages 42 and 43 of her paper that the virtue of metropolitan busing is that in those few segments, in those areas of our metropolitan districts which are integrated, there is such a passion for the neighborhood school that they will insist on their remaining integrated so as not to be forced to be bused.

I think that the tone of those comments on 42 and 43 indicate how tragic the whole situation has become, in which people are treated as pawns for objectives which for so many of us are already being achieved.

I think the value of the neighborhood school, the value of choice—free choice was given a bad name once, but there is such a thing as choice—is now so markedly understood and is so passionately adhered to by so many people that I think Mr. Taylor and his friends are leading to the destruction of the public school system, to where people will say, yes, we do not want it and we simply are not going to go there anymore and we are simply going to get support from the public authorities to choose the schools we want.

He has spoken strongly. I speak strongly, too. I do not want to be in a position of saying that I am against integration or that I am for integration. Fortunately, I went to integrated schools so there is no reason why I should be against them.

I am sorry the matter has come to the point where it has, where obviously on both sides unreason and passion are prominent, but I do think there is a situation here that something like 85 percent of whites and 50 percent or more of blacks just do not like. I think it is also a situation, which Mr. Graglia can speak to better than I can, that in no way is required by the Constitution.

I simply do not see how this kind of situation can be maintained forever against the will of the people.

Mr. Markman. Professor Graglia?

THE BUSING ISSUE TURNS ON QUESTIONS OF FACT

Mr. Graglia. I think that real progress is made on an issue of this sort, really on any issue, when it moves from merely disagreements of opinion to, at least in a very important part, disagreements on matters of fact, things that can be investigated and empirically determined.

The basic facts that I would urge Congress to investigate and determine here as a basis for exercising its constitutional authority are, first, the facts as to what is responsible for the racial separation that exists in our schools. Is it the result of racial discrimination by school authorities, which is the essential basis for the courts acting?

Second, what are the results of court ordered busing? Does it increase integration? Does it increase educational opportunity and so on?

The issue has also come down to matters of fact even on questions as to the law: What have the courts done in fact?

Both Mr. Chambers and Mr. Taylor asserted repeatedly, strongly, and with confidence that the courts cannot be criticized as seeking racial balance for its own sake, that in fact the courts have acted cautiously, with discretion, and only on the basis of real substantial findings of de jure segregation.

I submit to Congress that as a matter of fact, simple and demonstrable fact, that is not so. Once it is shown that is not so, I think it is shown very clearly that the courts have not behaved properly.

For example, Chambers and Taylor both referred to the *Keyes* case. The situation in almost each of these cases is really hard to believe once you get into them. As incredible as it may seem, busing came to Denver in the *Keyes* case not because the school authorities in Denver discriminated racially to keep the races apart.

The incredible fact is that busing came to Denver for the very opposite reason. The authorities in Denver acted voluntarily to increase racial integration. Denver and Colorado had laws against all forms of racial discrimination antedating Federal laws.

It is interesting to compare the situation in Denver and the situation in northern New Jersey, which had a so-called desegregation case arise at the same time.

SPENCER V. KUGLER (NORTHERN NEW JERSEY)

In northern New Jersey, home of the school authorities suggested voluntarily taking steps to increase racial integration in the schools. There were areas where the schools were nearly all black and areas where the schools were nearly all white, as is the case almost anywhere else. No one suggested doing anything about it.

The school authorities would not do anything about it for the reason that they thought it was constitutionally prohibited to assign kids on the basis of race. They would not do anything about it because they also thought it would be futile to attempt to do anything about it.

The judges in northern New Jersey looked at that situation. The school authorities had attempted to do nothing about it. They found no constitutional violation. That was the end of the matter: no busing in northern New Jersey, and the Supreme Court affirmed in *Spencer* v. *Kugler*.

THE KEYS (DENVER) CASE: NO RACIAL DISCRIMINATION FOUND

However, in Denver, with much more activist, liberal if you will, school authorities, they voluntarily took steps to increase racial integration. They gerrymandered school districts. They did, indeed, gerrymander school districts in Denver, as has been said here, but they gerrymandered them to increase integration, not to increase racial separation.

They passed a resolution that they would build no more schools in the black areas, and they built no more schools in those areas.

Finally, they took the ultimate step—what Dr. Armor calls the atom bomb of this area—namely, busing. They voluntarily instituted compulsory busing.

At this point, they went too far for even the people of Denver. The people of Denver elected a new school board which rescinded this busing plan before it could be put into effect.

As incredible as it may seem, the constitutional violation that was found in Denver by the district court was that Denver rescinded the plan that they had voluntarily adopted to bus kids. It is not that Denver had engaged in racial segregation. To say that the racial separation that existed in the Denver schools was a result of racial discrimination by school authorities is factually and demonstrably preposterous.

The school authorities in Denver had for years acted only to increase integration. There could be no question as to what was the cause of the racial separation in Denver schools.

It was simply that there was a core area of black residential concentration, a core area of a very small percentage of blacks that had gone back to the early 1950's. As more blacks moved to Denver during and following the Second World War—this is the pattern in almost every major northern city—the blacks tended to move to those same areas. Those black areas expanded. Of course, the neighborhood schools went from being white to largely black as a result, not as a result of racial discrimination.

The district court in Denver did not even purport to find that the separation that existed in the schools was a result of discrimination. The lower court quite explicitly found that it was unconstitutional for the school board to rescind the busing resolution—a proposition that is clearly incorrect as a matter of law, as the Supreme Court itself has held in a later case.

However, in the *Keyes* case itself, the Supreme Court just ignored what the district court had in fact done and proceeded on the mistaken assumption that racial discrimination had been found although it clearly had not been found.

SWANN V. CHARLOTTE-MECKLENBURG: NO RACIAL DISCRIMINATION FOUND

As I say, these are matters of fact. Mr. Chambers refers to the *Charlotte-Mecklenburg* case. He is from North Carolina. I am sure he knows the situation there in much more detail in many ways than I do.

However, I do know that the Charlotte-Mecklenburg schools were held to be unsegregated, to be constitutionally operated in 1965. Judge Craven was the district judge, a truly eminent and able Federal judge, unfortunately now deceased. He looked at the operation of the Charlotte-Mecklenburg, North Carolina school system and said it was in compliance with *Brown*, as indeed it was. No racial discrimination of any sort was being practiced in that school system.

That holding was appealed to the fourth circuit, and the fourth circuit, sitting en banc, affirmed that holding. That should have been the end of that matter.

However, the matter was reopened, as Mr. Chambers said, by him and his group. They brought a further action in *Charlotte-Mecklenburg*, asking now not for simply the end of racial discrimination, which had already ended, but asking now that racial discrimination begin again, that now the kids must be assigned on the basis of race, excluded from their neighborhood schools because of their race and assigned to other schools so as to compel integration.

This is done on the theory that they are combating racial discrimination, that they are undoing racial discrimination. The district judge did not make any such finding.

Mr. Taylor talks about gerrymandering school districts, assigning black teachers to black schools, and that these are only a few of the violations found. Those violations were not found in the *Keyes* case in Denver. I do not think anyone who looks at the record realistically would, in fact, say otherwise. Nor were they found in North Carolina in the *Charlotte-Mecklenburg* case.

Indeed, there were 11 separate charges of racial discrimination made; it was claimed that the school board had racially discriminated in 11 respects. The district court did not find racial discrimination in any of those 11 respects.

However, he ordered busing nonetheless, without finding any racial discrimination and without finding any violation of the 1965 order in which the Court of Appeals for the Fourth Circuit had said the school system was being operated constitutionally. No finding was made that the situation had changed and that the school board had not complied in every respect with that order.

BUSING ORDERED TO IMPROVE EDUCATIONAL ACHIEVEMENT

Then why did the district judge order busing in *Charlotte-Mecklenburg* anyway, without finding racial discrimination? All you have to do is read the opinions and you will see the district judge saying that in his opinion racially integrated schools were a good thing. In his opinion, they would lead to educational advances.

Some professors of education from Rhode Island College and elsewhere had so testified. This poor district judge just sopped that up. He made incredible statements such as that it is established that if you simply mix the races in the schools in such proportions as 70 percent white and 30 percent black so that each school is predominantly white, this will solve the underachievement that often occurs among the black students.

That is a most debatable proposition, of course, as a matter of social science fact, but the point is this district judge believed it. He ordered busing on that basis.

The supposed constitutional basis for busing was simply not there. The district judge was quite ingenuous, quite frank. He said it was not a question of whether Charlotte-Mecklenburg has complied with *Brown*. Of course Charlotte-Mecklenburg has complied with *Brown*. Of course Charlotte-Mecklenburg has desegregated the schools.

He said what had happened is that the "rules of the game have changed." That is a frank man. You do not catch the Supreme Court speaking that way. He said we have new rules. Under the new rules, you simply have to integrate the schools and produce as much racial balance as possible, not because you are undoing racial discrimination but because, in his opinion, this was the answer to the problem of achieving greater educational accomplishment. He ordered it on that basis.

I could go down the rest of the cases pretty much the same way, but I would submit to Congress the assertions made here in defense of busing, or in support of the position that Congress should not act to stop busing, that the courts have acted only when they have found racial discrimination and they have acted only to the extent necessary to undo that racial discrimination or its continuing effects are not the fact.

Mr. MARKMAN. Professor Glazer, I understand that you have a plane to catch. We very much appreciate your coming today. We will continue with the rest of the panel. Your complete statement will be a part of the permanent record.

Mr. Chambers, if you would like to continue and respond to what you have heard?

Mr. **Chambers**. Briefly, I agree wholeheartedly with Mr. Taylor that it is important that we point out the history of this country in talking about this particular issue.

What we did following or during the reconstruction, while that may produce some divisiveness, that is precisely what we are about here with this particular issue.

I would like to address the comments by Mr. Graglia first. I must say that that is the most irresponsible reading of the *Swann* case that I have ever heard. What makes it even more irresponsible is the fact that the record itself is there publicly published.

To suggest that the court did not make specific findings of intentional racial discrimination is not a proper reading of that decision. Not only was it not a proper reading of that decision, it is not a proper reading of the Fourth Circuit Court of Appeals, nor a proper reading of the U.S. Supreme Court.

Just briefly, in 1965 when that case was considered by Judge Craven—and I, too, hold Judge Craven in very high standing—we were operating under *Briggs* v. *Elliott*. The Supreme Court had not yet decided the *New Kent County* case. What Judge Craven did was rule that *Briggs* required only a neutral plan of desegregation.

Anyone reading school desegregation would appreciate his position in 1965. In 1968, we did have the *New Kent County* where the court talked about the need for some affirmative relief. That is what Judge McMillan ordered after finding purposeful discrimination not only before 1965, but between 1965 and 1969.

The record in that case, the findings of the court clearly demonstrate purposeful discrimination. That was found by the district court. It was affirmed by the court of appeals. It was affirmed by the Supreme Court.

If that presentation a moment ago was what the Congress will use for the purpose of enacting antibusing litigation, I submit it would be clearly improper.

We have made some progress over the past few years with desegregation in the schools. That progress has led to more active and effective participation of minorities and whites in our society.

Every opponent thus far that I have heard with respect to desegregation has suggested that desegregation or busing was hurting the community, causing devisiveness, but no one has yet offered a viable alternative.

If one follows what is proposed to its logical conclusion, we would simply sanction segregation throughout the Nation. If we look at the so-called voluntary plans, if we look at proposed legislation now before Congress, we do not have there a viable alternative to complete desegregation of school systems. We would simply sanction leaving the schools racially segregated, notwithstanding intentional acts and conduct by the State in creating or causing that situation.

Busing does cause some inconvenience, but we have had busing, as Mr. Taylor has pointed out, over the years. The relief that is granted and the help that minority students receive as a result of desegregation is clearly worth the cost that we all have to spend in correcting what we all created in years past.

Again, I would suggest that we should clearly endorse now what the courts have done toward correcting this past wrong, that is to require that school districts throughout the Nation implement effective desegregation plans.

Mr. MARKMAN. Thank you very much, Mr. Chambers.

Mr. Taylor?

Mr. TAYLOR. Mr. Markman, I will relieve your minds by saying I will not take equal time to respond to some of the statements that Professor Graglia made.

I am happy, however, to join issue with him on what the facts and findings were in the *Keyes* case. I would suggest to you, just as Julius Chambers suggested with respect to *Charlotte-Mecklenburg*, that if you review the record and the findings of that case, you will find that Professor Graglia's handling of them was totally irresponsible.

I will just mention a couple of things you will find. One is that while it may be an interesting question whether the reversal of a voluntary policy of school desegregation is in itself a violation of the Constitution, that was not the basis of the decision. It was not the basis of the decision in the tenth circuit. It was not the basis of the decision in the Supreme Court of the United States.

Second, as to what was found in this case, let us just look at the question of what happened in Denver when black and white schools became overcrowded. Over a period including 1964 when black schools became overcrowded, mobile classrooms were used to accommodate the additional black students. They were used almost exclusively for that purpose, in 28 of 29 instances.

Where the overcrowded schools were white schools, the school board's solution was different. It did not build mobile classrooms. It bused white children—yes, bused white children—sometimes the width of the district to other white schools, even though underenrolled minority schools were closer.

That was the kind of evidence of deliberate racial segregation that led the court in the *Keyes* case to find that there had to be a school desegregation remedy.

Lastly, I want to simply say that I have not challenged anybody's motives here. I do not intend to challenge anybody's motives. If Professor Glazer had stayed, I would have congratulated him for his contribution to cooling down the debate.

The fact of the matter is that when statements are made that are unsupported by any social science finding or any evidence, they must be challenged.

The public schools have been an instrumentality in this country for mobility for many groups. They must continue to be that kind of instrumentality. What you have heard here, and if you have further testimony, what you will find is that through all of the difficulty, the decisions made by the Supreme Court, and the ways in which communities have carried them out in many places have provided minority children with an opportunity to be productive members of this society.

If we are concerned, and if this administration is concerned, about having a productive society, then there is nothing more important, in my view, than taking the steps necessary, as hard as they may be, to provide children with an opportunity to become productive members of society. You do not do that by herding all the black, Hispanic, and poor children together in the schools and saying to the teachers in those schools, "You take care of them." You do it by facing up to the hard facts.

Lastly, I do think the courts in this country are entitled to a presumption of regularity. I do think the attacks we have heard on the courts today are very irresponsible. I hope the committee and the staff will take the time and take the trouble to examine the court decisions to see what they really say.

Thank you.

Mr. **Markman**. In the interests of fairness, perhaps we will give one more minute to Professor Graglia to respond.

Mr. **Graglia**. I would just like to say that I of course agree with Professor Taylor that what should be done is go to the records of these cases and see who is right. Obviously we cannot debate this to a victory or defeat here as to who is right on what is involved in those cases. Congress going to the record and seeing for itself who is right on this factual issue, of course, is the thing to do.

Mr. Chambers has, I think, put his finger on two important things. One is a matter of constitutional law and one really is a matter of social policy.

THE CONSTITUTION STILL DOES NOT REQUIRE INTEGRATION OR BALANCE

As to constitutional law, he said that Judge Craven, in finding that the North Carolina Charlotte-Mecklenburg school system was being operated constitutionally was still operating under the so-called *Briggs* v. *Elliott* rule, namely that while the constitution prohibits segregation and therefore requires desegregation, it does not require integration.

He is right that Judge Craven was operating under that rule. I think, however, that, at least in theory, the courts are still operating under that rule. It is of crucial importance here to understand this. That is, the courts still maintain that the Constitution does not require integration or racially balanced schools in and of itself. It requires only the ending of racial discrimination and whatever continuing effects there are of racial discrimination in the past. It is very important to understand that that is still the rule.

THE ALTERNATIVE TO BUSING IS NONRACIAL NEIGHBORHOOD ASSIGNMENT

Secondly and finally, Mr. Chambers asked what is the viable alternative to busing? If we do not have busing, are we simply going to live with and accept segregated schools?

This whole question and argument really turns, I think, largely on a semantic question of how we are using the words.

I agree with him and with others who have said that busing is an essential tool for producing racially balanced schools. That is the case. I do not think magnet plans or gerrymandering or anything else is, in fact, going to produce racially balanced schools, certainly not in our big cities where the majority of blacks now live.

If you want to racially balance those schools, you are going to have to transport those kids. Indeed, the whole busing requirement could be said to be simply an attempt to make the schools more racially mixed than the neighborhoods are. You cannot do that except by moving the kids out of their neighborhoods.

However, is there a viable alternative to busing? Yes, there obviously is a viable alternative. That is no busing. That is assigning kids to their neighborhood schools.

RACIAL IMBALANCE IS NOT RACIAL SEGREGATION

This accepts school segregation then? No it does not, because those schools are not segregated. Those schools are racially imbalanced, but they are racially imbalanced because of the residential patterns. They are not racially imbalanced because of racial discrimination by the school authorities. There is nothing wrong, nothing unconstitutional, with that situation.

Mr. **Markman**. We had better come to a conclusion here, I think.

Again, we would like to thank everybody for their appearance before the subcommittee today. It has been an extremely useful hearing. The permanent record will reflect everything that has been said today. I know the Senators who were absent will be reviewing it on their own.

The next hearing of the Constitution Subcommittee on this matter will be on June 3.

Thank you again.

[The subcommittee was adjourned at 12:50 p.m.]

THE 14TH AMENDMENT AND SCHOOL BUSING

WEDNESDAY, JUNE 3, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:40 a.m., in room 2228, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Also present: Senator Joseph Biden.

Staff present: Stephen J. Markman, general counsel; Tom Parry, chief counsel; Pete Ormsby, professional staff assistant; Randy Rader, general counsel; Claire Greip, clerk; and Kim Beal, assistant clerk.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH AND CHAIRMAN OF THE SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. This marks the second day of hearings of the Subcommittee on the Constitution on the subject of school busing as a means of racial desegregation. This subject continues, as it has for more than a decade, to be one of the most divisive and heated issues of national public policy.

During our first day of hearings, we heard testimony from four of the Nation's leading experts on the subject of school busing. Prof. Lino Graglia of the University of Texas Law School and Prof. Nathan Glazer of Harvard University argued generally in opposition to forced busing as a remedy for racial imbalances in public schools. Julius Chambers of the NAACP Legal Defense Fund and William Taylor of the Center for National Policy Review argued the opposite position. Each of our witnesses shed important light on this very difficult controversy.

Today, we will continue to take a look at the dilemma of school busing: What is the law today, a quarter of a century after *Brown* v. *Board of Education* and a decade after *Swann* v. *Charlotte-Mecklenburg?* Has school busing been successful in achieving its objectives of equal educational opportunity? Finally, what, if anything, is to be done legislatively by this body?

Our hearings will continue to be general hearings. We will not focus on specific legislative vehicles, although our witnesses should feel free to make whatever recommendations they believe are warranted.

Because of the nature of our witness list today, I would anticipate a slightly greater focus on the merits or demerits of school busing in the context of individual communities. This testimony and future testimony of this nature should complement our more academically oriented testimony.

Let me emphasize, in conclusion, my own feelings that the school busing issue is one of the most critical issues facing our society today.

Apart from the relatively narrow question of whether or not school busing orders are justifiable and appropriate in the context of individual communities, we are facing more fundamental issues that relate to the health of our public school system in urban areas as well as the extent to which the Federal Government is going to be allowed to impose its own policy preferences and social objectives upon often unwilling neighborhoods and communities.

We have an excellent group of witnesses today, and I look forward to today's hearing. It is an important record that we are continuing to build here today.

Our first witness today will be the Honorable Jean Mathews, who is a distinguished member of the Missouri Legislature. She represents the suburbs of St. Louis in the House of Representatives of that State. We look forward to her observations on the school busing controversies in that area.

Representative Mathews, if you would take the witness chair we would appreciate it. We will begin with your testimony.

STATEMENT OF HON. JEAN MATHEWS, STATE REPRESENTATIVE, STATE OF MISSOURI

Ms. MATHEWS. Senator Hatch, ladies, and gentlemen, I am Representative Jean Mathews of Florissant, Mo., a member of the Missouri Legislature. Thank you for allowing me the privilege and opportunity of addressing you regarding the issue of court-ordered, forced busing of public schoolchildren.

I am not here to testify so much as an official representative of the State of Missouri but, rather, as an individual who, as a parent of children in the public schools, and as a former teacher, and as an elected official, has had the opportunities of witnessing the results of forced busing and of listening to the voters' feelings regarding this issue.

Much of my testimony may not be new information to you but will be reflective of 94 percent of the voters in my district and the St. Louis metropolitan area.

Court-ordered, forced busing is a major concern in the St. Louis area. The school district which my legislative district falls within was forced to initiate a court-ordered, forced busing program in 1975.

The city of St. Louis has more recently been forced to accept court-ordered, forced busing, and a case is presently in the Federal courts which would bring about a multidistrict forced busing plan involving the city of St. Louis and the three adjoining counties. It is this proposal that I have come to address.

In my capacity as an elected official, my constituents, both black and white, have voiced to me a concern regarding the massive economic costs of moving bodies around for the sole purpose of achieving racial quotas. The money required for such a plan will rob other areas of serious need.

Because of the vast financial resources required for such a plan, my constituents fear that the time may come when a judge will determine to set a new tax rate for the entire metropolitan St. Louis area without a vote of the people, as was done in 1975 in the Ferguson-Florissant School District where I reside.

Another concern is that of distance. When many miles intervene between the school a child attends and his home, his parents find the family unit under increased stress. Parental input into the school system diminishes or disappears.

It becomes a massive labor or an impossibility to pick up a sick child at school, to attend a play, a football game, a PTA meeting, or a parent-teacher conference. Eventually, there are no football games or plays because the money has to go into school buses, drivers, and gasoline.

Another problem voters fear is that school boards will become unresponsive to parental input because the parents of the children bused to the school at the order of the court may not be voters who elected them.

Another comment voiced repeatedly to me is the doubt that there is a real gasoline shortage, or ever was, if gasoline is plentiful enough to pour into the gas tanks of school buses to move children from one area to another.

As an elected State official, I share all of the concerns I have just mentioned, but particularly the concern regarding the economic ramifications of forced busing during a period when the State of Missouri is having critical financial problems.

Revenue is sharply down, while demands for State services continue to rise. The constitution of the State of Missouri prohibits deficit spending on the part of State government. It also includes a recent amendment requiring that all increases in State taxes, fees, and/or licenses must be put to a vote of the people, and the temper of the voters is such at this time that the passage of any increase in taxes is highly unlikely.

Because of the irresponsibility of the past State administration, the present administration and Missouri General Assembly have found themselves with the need to make cuts amounting to $230 million in State programs by June 30 of this year to avoid being in violation of the State constitution.

Budget cuts have been so severe that mental patients have been released from State institutions onto the streets, and others have been refused treatment.

State revenues are still dropping from anticipated levels, which were estimated as lately as March of this year, requiring immediate cuts of at least $20 million more as we begin a new fiscal year on July 1.

The State has had to freeze funds for teacher pay increases and cut funding for education, but the courts have consistently turned a deaf ear to our dilemma.

Part of this vast deficit in State funds can be attributed to the recent forced busing case involving the city of St. Louis which cost the taxpayers over $22 million in its first year.

The State was arbitrarily ordered by the court to pay one half of that amount. The legislature was not given an opportunity to vote or discuss the issue before the demands of the court had to be met.

Costs for fiscal year 1980-1981 are expected to amount to nearly $7.5 million to continue the present busing program in the city of St. Louis. If these costs, which amount to $546 per pupil per year are transferred to a multidistrict program, the costs threaten to become overwhelming.

Where will Missouri get the money for a massive interdistrict busing program? Will we be forced to turn more mental patients out into the street?

Another major concern I have as a State elected official is the erosion of local and State powers by the courts.

During the recent court case involving the Ferguson-Florissant School District where I reside, the courts ordered a merger of three school districts, then called that merger an annexation, and then raised the tax levy of the citizens residing in the two school districts which were "annexed" without a vote of the people.

My constituents view this as a case of taxation without representation. They are justifiably concerned when they read statements such as this one quoted in the St. Louis Globe-Democrat on May 5, 1980: "U.S. District Judge James Meredith could order a property tax rate increase to pay for St. Louis public schools desegregation, under a precedent set in 1975." That precedent was the *Ferguson-Florissant* case, the school district where I reside.

Quoting further: "* * * board attorneys said that such a tax order 'should only be a last resort' if there is not enough money from local, Federal, and State sources."

Quoting from the Journal newspaper of July 16, 1980: "U.S. District Judge James H. Meredith has warned city comptroller Raymond T. Percich that the court may order the city to raise taxes to finance the city's schools integration plan.

"In a letter dated June 26, Meredith told Percich: 'It may be necessary before this case has been finally concluded to levy additional taxes upon the taxpayers of the city of St. Louis in order to help finance this plan.' "

Regarding the comment that the raising of taxes would only be a last resort when other funds are not available, it is evident that other funds are not available. Must we then accept that last resort mentioned earlier—taxation without representation?

I have come before this subcommittee to urge you to take action to limit the powers of the courts regarding this issue.

In his first inaugural address, Lincoln said: "If the policy of the Government upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."

According to article III of the Constitution, "the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."

Here is a tool to defend the rights of parents who wish to send their children to the neighborhood schools which their taxes support, where their votes elect the school board, and where their opinions are important to the teachers and administrators who educate their children.

The Reagan administration nominee for the post of Assistant Secretary of Education, Vincent Reed—who, by the way, is black and a product of the St. Louis Sumner High—has said: "If we can get parents back to the place where they have a key role to play, we can make the schools work."

How can we put the parents back into the schools and make the schools work if the barrier of distance is placed between them and their children?

We have a saying in the hills of Missouri: "If it ain't busted, don't try to fix it." The concept of the neighborhood school is not "busted," it is an integral part of our society, and to forbid a child the right to attend the school nearest his home because of his color and to bus him miles across town against his will or the will of his parents is just as wrong now as it was 20 or 30 years ago. It was wrong then, it is wrong now, and two wrongs have never added up to one right.

Since the change in administrations at the national level has come about, much stress in the St. Louis area has been shifted from the mandatory busing plan that the courts were designing to a "voluntary plan." But, I firmly believe that if a change in administrations came about tomorrow the courts would then, in the Metropolitan St. Louis area, immediately shift back to the mandatory plan again, and this probability will continue as long as we hesitate to harness the Federal courts in this matter.

There are many social experts who would ask me for another solution, other than busing, to the problems of racial imbalance because I do oppose massive court-ordered busing. Let me again quote Vincent Reed: "Mixing races does not automatically improve the quality of education. The real action is in the classroom itself. It is more important to concentrate on getting good teachers there than anything else."

To end segregation through a natural process and yet protect the neighborhood schools, let us make sure there are no legal barriers to integrated housing. If a more aggressive approach is still demanded or determined to be needed by this body and by the Congress, then let us work together to implement a voluntary program, remembering that a voluntary program should be truly voluntary.

Participation should not be forced under the threat of mandatory busing because, should a man stand upon the edge of a cliff and be given the choice of jumping or being pushed, has he any real choice? The end result is the same.

Participation in a voluntary program should not impute past guilt. A voluntary program should be voluntary for all students of all colors, not just a select few. And a voluntary program must be affordable to all concerned—to State, local governments, and, most of all, the taxpayer.

I urge you, gentlemen, to deal with this issue by utilizing the power of the Congress to limit the powers of the courts, preferably through legislation, but if necessary by a constitutional amendment. And we ask, Senator Hatch, that the issue be addressed soon.

We have a court system filled with social architects who will continue their efforts to redesign our society in their own image at the expense of our democratic form of government if they are not limited.

As one of my constituents suggested, somewhat facetiously, why don't we bus judges, not students?

Senator **Hatch**. That is not a bad idea.

Representative Mathews, have there been significant increases in private schools and private school enrollment in the St. Louis area, to the best of your knowledge?

Ms. **Mathews**. Yes; there have been notable increases. I have two private schools within my district. One of them has increased by at least two-thirds since the 1975 merger of the Ferguson-Florissant District with the two districts which were annexed to it, and the other is a new private school which is growing very rapidly.

Senator **Hatch**. Would it be your contention then that forced busing actually is lending impetus to the growth of private schools rather than stronger public schools?

Ms. **Mathews**. Yes; I personally feel, through my own experience and what I have read from those individuals both pro and con on the busing issue, that forced busing, if it is not limited, will destroy the public school system in America.

Senator **Hatch**. Have there been increased tensions between the white and black communities in the St. Louis area as a result of the busing controversy?

Ms. **Mathews**. Yes; again, I can refer to my own experience in the matter of the Ferguson-Florissant district. There has been a large increase in the ratio of violence in the schools and of racial incidents. Though the first year was, of course, the most acute, they are still very, very notable and still much higher than preceding the merger.

Senator **Hatch**. Do you feel that the black community in St. Louis desire forced busing in order to achieve integrated schools?

Ms. **Mathews**. No.

Senator **Hatch**. Do you have any idea of percentages?

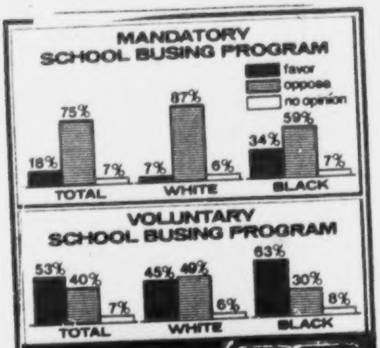
Ms. **Mathews**. Yes; I have in a handout of what I call enrichment material—that is the teacher coming out in me—a clipping from the St. Louis Globe-Democrat, and I have underlined the areas in the article in a massive, well respected poll which suggests that blacks in the entire metropolitan district who have children in public school—of them, 64 percent do not want forced busing. In my area, the ratio is somewhat higher.

Senator **Hatch**. Thank you, Representative Mathews. We appreciate your taking the time to be with us today. We do appreciate the testimony that you have given us with regard to the St. Louis busing controversy. It is a very difficult problem.

Of course, you are not alone in this. Later in the day, we will get into the Delaware situation which may be even more difficult than yours—although it is hard to believe.

Without objection, the materials you have supplied will be included in the record at this point.

[The material to be supplied follows:]



Integration yes, busing no, St. Louisans say

By JACK FLACH
Globe-Democrat Political Editor

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By an overwhelming margin, residents of St. Louis favor integrated schools, but blacks and whites alike are staunchly opposed to mandatory busing of children to achieve that end, a Globe-Democrat-KMOX-TV poll shows.

A majority of city residents, however, favor some sort of voluntary system to integrate city schools.

Mandatory busing, such as has been ordered here by the federal courts in the city school desegregation case, is opposed by 75 percent of those interviewed, with only 18 percent favoring it and 7 percent having no opinion.

Blacks oppose mandatory busing 59-34 percent, with 7 percent having no opinion. Whites oppose busing 87-7 percent, with 6 percent having no opinion, the poll shows.

PEOPLE WITH children are even more opposed to mandatory busing, blacks by a 64-30 percent margin with 6 percent having no opinion, and whites by a 94-3 percent margin with only 3 percent having no opinion.

The question asked was, "Do you favor or oppose a mandatory busing program to achieve racial integration of public schools?"

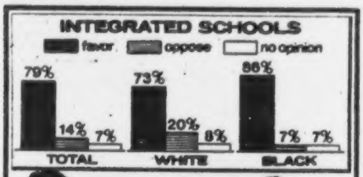
Overwhelming opposition too was

Globe-Democrat
KMOX-TV
POLL

prevalent among all groups interviewed. Seventy-two percent of those younger than 50 are against mandatory busing, and 80 percent of those over 50 are opposed to it. Seventy-two percent of males and 78 percent of females oppose it. Seventy-one percent of those making less than $15,000 a year oppose it, as do 78 percent of those making more than $15,000 a year.

BUT 79 PERCENT of those polled said they favor integration of public schools — "having children attend school with children of another race" — with 14 percent opposing it and 7 percent having no opinion. Broken down by race, whites favor integration

Continued on Page 9A



[From the St. Louis Globe-Democrat, May 5, 1980]

MEREDITH CAN ORDER TAX HIKE

(By Charles E. Burgess, Globe-Democrat Education Writer)

U.S. District Judge James H. Meredith could order a property tax rate increase to pay for St. Louis Public Schools desegregation, under a precedent set in 1975, school board lawyers say.

The earlier case involved Meredith's order to merge Kinloch, Berkeley and Ferguson-Florissant school districts. The order to combine them and set a districtwide property tax rate was upheld by the 8th U.S. Circuit Court of Appeals.

"The circumstances were a little different, but it was something he (Meredith) did himself," St. Louis school board attorney Paul B. Rava said Sunday.

"A federal court can set aside a state or a local statute when it's been adjudged that a constitutional violation is involved, and we think that is the precedent here." Rava said.

The school board filed its desegregation plan with Meredith Friday, and board attorneys said that such a tax rate order "should be only a last resort" if there is not enough money from local, federal and state sources to pay for this fall's $22,152,413 desegregation plan.

In the case of the three North St. Louis County districts, Meredith in June 1975 ordered their merger to remedy the Berkeley segregation of black students into a separate Kinloch district in the 1930s.

Meredith ordered a uniform property tax rate of $6.03 per $100 of assessed valuation in the new district. Ferguson-Florissant's rate had been $5.36 Berkeley's $3.80 and Kinloch's $4.97. The appeals court approved the action, but lowered the rate to $5.38.

The St. Louis system has a property tax rate of $3.65, including 17 cents for debt retirement, which is scheduled to expire in 1984.

Meanwhile, Associate Professor Gary A. Orfield of the University of Illinois, court-appointed desegregation expert, recommends in a report to be filed Monday that most of the board's plan "be approved as written for the coming school year."

The court should encourage participation by county districts in the future. Orfield recommended in the report.

He noted that the National Association for the Advancement of Colored People is preparing to sue county schools.

"Two years from now, I predict, there will not be a suburban district that did not wish it had a record of voluntary efforts to take with it into a long and bitter struggle over mandatory desegregation," Orfield said in the report.

Although the court cannot directly order county districts to participate Orfield said, it can;

Order the State Board of Elementary and Secondary Education to develop procedures for voluntary exchanges of students and voluntary "metropolitan magnet schools" and reimburse transportation and tuition costs involved.

Order a plan by September 1981 to merge county and city vocational education programs under the state board's power to create vocational education regions.

Order the state board to finance 80 percent of transportation costs in the desegregation plan.

School board attorneys Friday asked the judge to order the 80 percent state financing of busing, and to pay up to half of the costs of the desegregation plan. An assistant Missouri attorney general has said the state would argue that it cannot meet those requests under current laws.

Orfield did not recommend approval of a school board proposal to disperse major vocational-technical programs at O'fallon Technical High School to general high schools. This should not be done until an agreement is reached or an order is handed down to merge county and city vocational districts, Orfield wrote.

He also advised that the board develop a plan for consideration by the court to involve North St. Louis schools in mandatory desegregation in 1981-1982, the second year of the desegregation plan.

The board's plan has been criticized by a court-appointed citizens advisory committee and by North St. Louisans because the mandatory desegregation is limited to South St. Louis and midcity schools.

The critics were dubious that the board's promises of extensive new enrichment and specialized programs to improve education in non-integrated schools would materialize if budget problems are unsolved.

Orfield also urged that voluntary enrollment in magnet schools be held at a 50-50 ratio of blacks and whites until Sept. 1, when others could be taken from waiting lists. The board wants the ratio to remain 70 percent black, 30 percent white.

An aide to Superintendent Robert E. Wentz was dubious that the Orfield recommendation would help recruitment. "We are ready to blanket the school system with information about magnet schools. If we wait until late summer, it would be a disaster," he said.

Lawyers in the case will begin a week of conferences Monday, Meredith has set a hearing for May 12.

[From the St. Louis Globe-Democrat, May 16, 1980]

DESEGREGATION COSTS ARE CHALLENGED AT HEARING

(By Charles E. Burgess, Globe-Democrat Education Writer)

A court-ordered property tax increase large enough to pay for St. Louis school desegregation would mean $125 more in taxes for the average homeowner, according to testimony in federal court Thursday.

The final day of a four-day hearing on the plan before U.S. Distric Judge James H. Meredith saw considerable sparring by attorneys on how much the plan actually will cost, and who will pay for it.

Among motions Meredith is considering is the school board's request to free $4.6 million from the system's debt retirement fund for immediate building renovation.

Arguments centered on the remaining $17.6 million of the board's $22.2 million estimated cost of carrying out the plan this fall.

The board has asked the judge to order a tax increase if all other sources fail, although it is seeking about $10 million in federal emergency money.

St. Louis Deputy Assessor Lowell G. Jackson, called by assistant St. Louis city counselor Charles Kunderer, testified that a $1.25 increase in property tax rates for each $100 assessed valuation would be necessary to raise the $17.6 million through local revenues.

"For the owner of a home valued at $30,000 . . . that would be about $125 in additional tax," Jackson said.

Missouri Assistant Attorney General J. Kent Lowry, representing the state and the state Board of Elementary and Secondary Education, challenged efforts to get the bulk of the money from non-local sources and asserted that the $22.2 million contains expenses the system would have despite desegregation.

He said the state would be required to pay $9,636,000 in addition to normal allotments if Meredith upholds a board motion that the state meet half the costs of the plan after the debt retirement surplus is used.

Lowry's main challenge was directed at Louis H. Ratz, Jr., school system deputy superintendent for management.

Ratz testified that the system hopes to get enough state aid for operation of 225 buses by a contractor in addition to 20 owned by the system. Currently, 153 are used by the contractor, plus 20 locally owned vehicles.

"That would be the maximum need," Ratz said, "but the number operated by the contractor probably will be closer to 200."

Lowry maintained Ratz was "asking the state to fund 225 buses when you don't expect to use them."

He said the cost estimate also contains salary, program and building renovation costs that would be spent anyway under a proposed $134 million operating budget for 1980-81.

Ratz said that the $22.2 million "is money over and above the general budget, and we do not now know the sources for it."

Meredith has ordered attorneys for the school board, state and U.S. Justice Department to submit figures on how much money can be made available from various sources.

The state now pays about 30 percent of busing costs for St. Louis. Another school board motion is seeking 80 percent.

John E. Moore, Jr., assistant commissioner for administration in the state Department of Education, testified that allotment of an additional $9.6 million to St. Louis schools would have to be skimmed off of what all other districts in the state would get.

"This would be a serious matter for some of them," Moore said.

The St. Louis system actually could increase its local revenues by about $4 million if it could win voter approval for a 25-cent tax increase, he added.

This would take the St. Louis basic levy of $3.48 close to the $3.75 that can be approved by a simple majority, he explained.

The state has asked Meredith to order a tax increase to enable the system to meet two-thirds of the desergregation costs on its own.

The St. Louis total tax rate of $3.65, including 17 cents for debt retirement, is considerably below the state average of $4.05, Moore said.

He testified that the current costs of busing in St. Louis "are extraordinarily high" in comparison to other districts around the state.

The average annual statewide cost per pupil for transportation is $147, he said, but the St. Louis system pays $515. The average cost per mile traveled by buses in the St. Louis system is $2.19, compared to 77 cents for buses owned by the Special School District of St. Louis County, he added.

Moore said he did not know all the reasons for the differences, but that contract busing generally is expensive and that such factors as magnet school busing and transportation of the handicapped are special problems in St. Louis.

He said that adoption of a plan to use each bus for three runs next fall each morning and evening—most make two runs now—probably could cut costs considerably.

Washington University Professor David L. Colton testified that the board's plan would leave about two-thirds of the city's black students in virtually all-black schools.

Colton, who was called by attorneys for the original plaintiff in the case, Concerned Parents of North St. Louis, recommended a revision that would give all black students from three to nine years in integrated schools.

Three parents filed a petition Thursday seeking to intervene in the desegregation case to prevent the closing of Adams School on the near South Side.

The petitioners, Evelyn Hasty, Carrie Brown and Iona Poff, claim that the school, among 27 scheduled for closing, is naturally integrated and should not shut down.

[From the St. Louis Globe-Democrat, May 1981]

Educator Urges City Students To Seize Opportunities

The belief that inner-city children cannot learn in today's schools is a figment of the imagination, the Reagan administration nominee for the third-highest position in the Department of Education said here Friday.

"I reject that notion," Vincent Reed said during a press conference at Beaumont High School, 3836 Natural Bridge Ave. He said school personnel should work harder to get parents to encourage inner-city students to seize the opportunities available to get an education.

Reed said school boards in recent years have mixed "too much politics" with their role as policy makers. As a result, board members often interfere with the day-to-day operation of schools.

Reed, who won a reputation as a hard-nosed but fair-minded superintendent during his 5½ years of dealing with the politically charged Washington, D.C., school board, spoke at Beaumont's commencement Friday night at Kiel Auditorium.

A 1947 graduate of Sumner High School, he was recently tapped by President Reagan to become assistant secretary for elementary and secondary education.

Noting that parents have the primary responsibility for seeing to the education of their children, Reed said, "if we can get parents back to the place where they have a key role to play, we can make the schools work."

Reed recalled three new techniques tested during his tenure as head of the Washington school system that aided home-school cooperation: some parents were required to go to school to get their children's report cards; parents were required to pay for students' lost books; and students were no longer passed to the next grade automatically.

"Some people have said it's psychologically damaging to give any student a failing grade. But it's psychologically damaging to graduate students from the 12th grade level when they're unable to function at that level, and then they go out and spend the rest of their lives waffling around and living off the rest of society."

Reed predicted the Reagan administration "will continue to enforce laws on the books" involving school desegregation and said he was "very much in favor of having all school districts reflect the population makeup of the country as a whole, if possible.

But he also said that could mean overcoming obstacles in some major urban areas and that the purpose of desegregation is to improve educational opportunities, not produce precise racial percentages in the classroom.

"Mixing races does not automatically improve the quality of education. The real action is in the classroom itself. It's more important to concentrate on getting good teachers there than anything else."

Reed lamented that "too many young people today are blaming the system for their problems."

"The educational opportunity is there for anyone if you really want to get it."

[From the Journal, July 16, 1980]

MEREDITH MAY RAISE CITY TAXES FOR DESEGREGATION

(By Grace Schneider)

U.S. District Judge James H. Meredith has warned city comptroller Raymond T. Percich that the court may order the city to raise taxes to finance the city school's integration plan.

In a letter dated June 26, Meredith told Percich: "It may be necessary before this case has been finally concluded to levy additional taxes on the taxpayers of the city of St. Louis in order to help finance this plan.

Meredith's letter was a response to a note from Percich, who has complained that the St. Louis Board of Education is "raiding" the debt retirement fund in order to finance the desegregation plan that will go into effect this September.

In late May, Meredith approved several portions of the city school board's desegregation plan, including authorizing the district to use $4,668,000 in debt retirement funds. The money is being used to renovate and remodel several school buildings that will be used as middle schools under the plan.

School officials, in an attempt to gather funds for their $22 million desegregation plan, looked to the fund, which they reported had a $4.6 million excess for paying off part of the bill. Percich, however, attacked the district, saying their use of the funds is unfair to city taxpayers.

"To have an 'excess' spent for purposes other than paying the outstanding principal and interest will result in the property taxpayer of the City of St. Louis having to pay an additional $4,668,000 in taxes to replace the money they have already paid for that purpose," Percich wrote in his letter to Meredith.

He added in a telephone interview, "We just got the shaft with this thing."

Percich said he was surprised to learn that in addition to allowing the "raid" on the debt retirement fund, the judge is also considering raising the taxes.

"I find this extremely frightening," he said. "We just got finished celebrating the Fourth of July. That's a holiday we celebrate because of the revolt against King George. Now we've got another example of taxation without representation. We're getting this shoved down our throats, too."

The current tax rate for city property owners is about $6.35 per $100 assessed valuation on property. Some 17 cents of the taxes that flow to the city schools pay for the retirement of the city schools' bond debt.

Percich said he could not estimate how much additional tax could be levied to pay for desegregation. However, he said if the state, which has been ordered to foot $11 million of the desegregation bill, levied taxes to pay its share, it could result in a tax increase of about 89 cents.

Senator HATCH. Thank you very much for coming.

Ms. MATHEWS. Thank you, Senator.

Senator HATCH. Our next witness will be Mr. Thomas Curtis, who is a former professor of law at Lincoln University where he has written extensively on the subject of affirmative action and school busing.

Professor Curtis is on the board of editors of "the Lincoln Review," a scholarly quarterly publication serving as a forum for unorthodox black opinion.

Professor Curtis, we are happy to have you with us, and look forward to taking your testimony at this time.

STATEMENT OF THOMAS CURTIS, LAWYER, AUTHOR, FORMER CONGRESSIONAL LEGISLATIVE COUNSEL, FORMER PROFESSOR, UNIVERSITY OF DELAWARE

Mr. CURTIS. Thank you very much, Senator.

I would just like to correct one thing: I live in Delaware. I have been a full-time faculty member at the University of Delaware. Even when I was for a period a part-time faculty member at Lincoln University, in Pennsylvania, I was a resident of the State of Delaware and therefore totally involved in opposing the forced busing for racial balance, which was imposed against the democratic will of the citizens of New Castle County, against the will of the majority of the citizens of the State of Delaware.

Senator HATCH. I see. I am sorry we did not have that in our biography of you.

Now, we are trying to limit our witnesses to about 5 minutes. We will put the complete statement in the record, so we do prefer summaries. We are flexible if necessary, however. You may proceed at this time.

Mr. CURTIS. Actually, I am here because I myself was something of a pioneer in educational equality, the early 1950's. I am here because I have studied race relations on several continents. I am here because I have written a book, "the Retreat From Human Rights," concerning what I see as this country's retreat from democratic constitutional legitimacy because of the desperately unfortunate embrace of numerical racial distribution for certain American races as a constitutional ideal. But, mostly, I am here as a parent and because I just wanted to compare my own educational experience as a child going to school with the indoctrination in black inferiority which my own children are expected to undergo at present.

The all-black school that I attended for the first 9 years of my education was a place of learning, fortunately. It was not a laboratory for race-centered experimentation and manipulation. I therefore was not indoctrinated in the discriminatory niceties of Government racial theory as a part of my education, I was just encouraged and permitted to learn.

The school that I attended was two blocks from home. It was a perfectly natural thing that students should attend school within walking distance from home. It was very fortunate because, for most of my growing up, our family did not have an automobile. To go to a school that was beyond walking distance would cut off such extracurricular activities as PTA, such useful extras as athletic activities, cut off participation in much of the fabric of normal school life.

Both of my parents at various times were president of the PTA. Their ability to participate in our schooling, was a direct result of our attending a neighborhood school. I seriously question the good faith and the basic judgment of those who would destroy the opportunity for such parental involvement.

The level of involvement and interaction in our education—my own, my brother's, and my three sisters'—is just unimaginable in any system that ships kids here and there because of the color of their skins. Such involvement could never have happened had we been racially regulated to schools out in the suburbs or some other distant place. It would have been impossible, without a tremendous public expenditure for bus rides and a requirement that we black people beg for bus fares that we could not afford, and that was out of the question.

The governmentally required distance between home and school confers the Government's blessing on a home and school relationship of estrangement and alienation.

I sometimes reflect that the people who make a pretty lucrative hustle drawing up these forced busing plans are so often suburbanites who have had easy automobility from the time they were 16, individually for themselves, and been driven around by their parents before that, and that they do not quite realize that lots of people do not have lots of cars and the ability simply to go here and there as the fancy strikes them. Distance can sometimes make access impossible. It is just a simple brute fact of life. This is a very diverse society, and the edicts of the powers that be, very often ring hollow indeed—compared to the commonsense of the ordinary American taxpayer.

As a child, I knew about discrimination. I knew that there was a school a few blocks east of our house where Thurgood Marshall, then of the NAACP and now on the Supreme Court—Justice Marshall—had gone, and it did not seem to have hurt him any. And it did not seem to have hurt the the rest of us, to have attended the other schools in the neighborhood.

The neighborhood and the school interacted and were part of one another. They mutually supported one another. It was much easier, obviously, to get parents and community volunteers for the school where their kids were being taught, than to ask citizens to volunteer to do something for the education bureaucracy. You do not find very many people who would volunteer for that. More good judgment.

During the time that I attended high school, when the Supreme Court delivered the Brown decision, you will remember that the case concerned a black father who wanted to enroll his daughter in school, and he went to the closest school, and they said: "You can't send her here. You have got to go to the other school—the black school."

The State of Kansas at that time had a rule which sent kids to school on the basis of the color of their skin. And the Supreme Court said: "You can't do that because then you are depriving people of their equal protection of the law."

There is no problem with that. That is a decision that I guess everybody is, by now at least, grudgingly reconciled to, in this country. On paper.

However, somewhere in the midsixties, as people were seeking remedies for every real or imagined grievance that might be thought about, there occurred a dangerous shift in focus: away from fighting discrimination to embrace somebody's crackpot idea that a governmentally dictated, discriminatory racial balance was a worthwhile societal ideal.

So now, people ask questions like: What remedy do you have to racial imbalance? That is like saying: What remedy do you have to the balance of bald people? What remedy do you have to Irish balance, to Italian balance, to Jewish balance?

Unless you are going to commit the society to a totalitarian impossibility, at some point, somewhere, you are going to be forced to the conclusion that racial balance is just impossible without an abrogation of essential democratic liberties.

Are you going to send people by jet plane from Montana? Do you have a Wyoming-to-South Carolina shuttle to balance the races? These are the kinds of things you reach if you really think about the ridiculous artificial compulsion toward forced busing for racial balance.

Also, do you want to lock a society into the kind of rigid framework where all sorts of societal provisions have to be frozen into law and enforced by the police power of the government, not because of any logical or reasonable implication of societal worth or societal intention, but based strictly on the requirement of racial balance?

If you do that, and we may be coming close to that monstrous ideal, what you have got is a continual kind of racial warfare. For me no majority will agree to allow its own to be put in a permanent situation of disadvantage. You may take that as given.

You will remember that Singapore split from the Malaysian federation because of the ethnic friction between the Chinese and the Malay.

There are lessons to be learned from our past mistakes and the mistakes of others. Any kinds of policies that a society wants to adopt to bring about greater equity and justice—in any kind of effort of that sort, the standard that one should seek to have applied throughout the society is the standard that the majority gets.

Whatever the majority gets, that is the least that a self-respecting member of a minority can ask for. And that is the most that he can expect to get—whatever the standard is for the majority.

To find racial balance as a constitutional imperative makes one have to ask why. Only if there is something peculiarly awful about us—that a group of black people together is a clump of ignorance and has to be salted out by some white intermixture—only under this kind of a theory can racial balance be at all considered to be important or useful. Or anything other than a racialist and antidemocratic imposition. And I know by every fact of my life that we black people have nothing whatever in common with the crude racial stereotypes of the forced bussers and the race balancers.

As to what one might ask of the subcommittee—I think the constitutional amendment, yes, and there are several legislative remedies that the subcommittee is aware of already. Each of them should be passed.

But, I just think about my own experience when I was in the army and when I worked as a legislative assistant here on the Hill some time ago. So often, the appropriations told the story.

Suppose the Congress were to decide that there was not to be any more money for any effort anywhere supported by the Federal Government that would seek to assign anybody anywhere because of the color of his skin. That no effort supported by the Federal Government could legally keep records based upon race or racial differences.

What I am talking about is a modern-day version of the old Powell amendment that Adam Clayton Powell used to introduce back in the sixties to make the Federal Government look up and be honest and say: "We are not going to spend any more of the taxpayers' money to treat one group of taxpayers different from another."

This is ethical and justifiable and one way to force individuals who say: "Oh, yes, I am for that," to come to terms with themselves and to have some record votes on, does the Government really mean forever to have us American citizens contending against each other for bits and scraps and tatters, on the basis of the color of our skin?

Thank you.

Senator HATCH. Professor Curtis, we appreciate your testimony. Why is it, despite your own negative experiences with school busing and what you suggest is the negative experience of large numbers of minority individuals, that there is virtually unanimous support for busing as a remedy for school segregation on the part of the black leadership in this country? Isn't that true?

Mr. CURTIS. For one thing, there is a common fallacy that has been a heritage of discrimination, and that is the tragically mistaken notion that blacks are inferior. And there are a lot of Americans who believe that. I will not make any guesses about percentages, but there are a lot of people who believe that black people are inferior, and a lot of those people who believe that are not white.

Senator HATCH. Are you suggesting that the black leaders feel that way?

Mr. CURTIS. I am just suggesting that in this entire society there are very few of us who are entirely free of the preconditioning of a couple of hundred years of slavery and then segregation.

I think in order to get free from this country's discriminatory past we have got to decide to treat everybody equally and decide to leave people free and let them be.

I am certain that if you decide to treat everybody equally people will decide to do different things—there will be diversity—but that is what the United States was about—allowing diversity.

When I was a military officer in the sixties, I participated in an experiment. Defense Secretary McNamara at that time initiated project 100,000. He brought in 100,000 people who would not ordinarily have been allowed into the military—they would not have been allowed in because they could not pass various tests. Project 100,000 brought them in, and gave them the chance to make it as soldiers.

I was a captain, and I was assigned two project 100,000 soldiers. And I had only one rule—don't give me anything special about those guys and their supposed deficiencies; just let them be; let them be and let them do. And they both made it. They became the soldiers that they were allowed to be.

I did not want to be charting and graphing their way through life, as if they were my own two laboratory animals. Subjecting them to any extra scrutiny, to make them acutely conscious of the fact that they, perhaps, had a different educational pattern than some others of their brethren. I just said: "We are all soldiers; we are all colored green; we all help each other; and we will just play it that way." This policy worked well. We had a good unit.

I would suggest that that is a more proper leadership position. Not to treat the members of any group as cripples, or inferiors, or second rate. But to require this society to treat all of its people as the constitutionally equal citizens that we are.

I think that it is about time, it is past due, for this society to stop cutting various little pie wedges out of the body politic and putting discriminatory little tags on us, and believing that that has any other result except to give supposedly equal American citizens a reason for more contention, more ethnic enmity, and at a time when this society really can ill afford that much extra, self-generated strife and disorder.

Senator HATCH. Professor Curtis, there seems to be a great deal of credible social science evidence to suggest both that busing has worked and that it has not worked. How, precisely, can this subcommittee digest these two diverse opinions and emerge with the right approach here?

Mr. CURTIS. If you think that there is a virtue in government's simply mixing bodies on the basis of skin color and that there is a virtue in having a particular percentage of different-complexioned students in particular schools, and then you do it, using the police power, and you do not blow the roof off the school, then you may consider yourself a success.

But, to my mind, number one, you may have destroyed several important and necessary community institutions while doing your mixmastering, and second, the real function of a school is to educate, and so even if you do your mixing without destroying anything else, to say that you have mixed the races together is irrelevant. It does not prove that you have done any educating. Perhaps you have only produced an excuse for your failure to educate.

More broadly, in this society we too often like to lay off so many responsibilities onto public institutions like the schools. There are jobs that should be done by the families and by the kinship group and by the neighborhood group and by the churches and by the voluntary sector, but because of actual or imagined deficits in these areas too many of us want to lay them off on the schools, and we must face the fact that our schools are having a lot of trouble coping with their basic job of education. I do not think they are really capable of coping intelligently with the demand for instant remedies for centuries of racial interaction in North America.

I think that this is the kind of problem where we the people have to just basically decide, what are we trying to do? What kind of a country are we?

I was doing some research for my book, "the Retreat from Human Rights," and I came upon a quotation from some people who had reason to know what they were talking about. This is from the South Carolina bill of rights adopted in 1868, during the Reconstruction period. At that time, their assembly had 124 delegates. There were 48 white and 76 black. Of the 76 black delegates, 57 were former slaves.

Among the things they decreed was: "Distinction on account of race or color in any case whatever shall be prohibited, and all classes of citizens shall enjoy equally all common, public, legal, and political privileges."

These guys really knew what racial oppression was, such a large number being ex-slaves. But when they thought about the kind of society they wanted for themselves and their children, they put it down on paper, and it turned out not to vary very much from every other American's ideal. That kind of an objective we have not reached yet, and the mindless compulsion of racial balance and the racial quota society threatens to place such decent societal ideals forever out of reach.

Senator HATCH. Thank you, Professor Curtis. Thank you for being with us today. We appreciate very much your efforts.

Mr. CURTIS. Thank you.

Senator HATCH. Without objection, your prepared text will be included in the record at this point.

[The material follows:]

On Sending Our Children to School

by Thomas Curtis

Concerning matters of race, my school days were pleasant and fruitful, and not degrading in any way. I regret that my children will not be able to enjoy the rights which I, as a child, was able to take for granted.

I was born in Maryland and reared in Maryland and Delaware. The Supreme Court's *Brown* decision, which outlawed segregated school systems, was not handed down until I was in high school. Yet, though I knew that my home states, unfortunately, required racial discrimination in their public school systems, as a practical matter that really did not affect me adversely at all.

The all-black school which I attended for the first nine years of my education was a place of learning, fortunately, and not a laboratory for race-centered experimentation and manipulation. I was therefore not indoctrinated in the niceties of government racial theory as a part of my education, but simply encouraged and permitted to learn.

I knew that Public School 130, a few blocks east of our house and all-black in every way, had long been a training ground for leaders of outstanding accomplishment—including the present Supreme Court Justice Thurgood Marshall. So the fact that the state of Maryland was foolish enough to have separate school systems for black and white, carried with it no necessary implication of black inferiority. And ample evidence to refute any such implication was close at hand, in the accomplishments of the black leaders trained in the institutions of our community.

Our problem was that the white establishment was prejudiced, and attempted to institutionalize its prejudices by giving them the force of law. But it was not necessary to examine the school system to figure that out.

My brother, sisters and I attended a parochial school two blocks west of our house. All of the students were black and all of the teachers were black, in the school that we attended, but again that carried no stigma of inferiority. It was only natural. We lived in a black neighborhood, and it just naturally stood to reason that most of the students attending a particular school would probably live in the neighborhood of the school, within walking distance. It was convenient in the event that a student became ill, brothers and sisters could attend the same school and enjoy experiences in common, neighborhood and parent volunteers were encouraged, and the surrounding neighborhood could develop a welcome sense of identity with the school and with those who worked and learned there. The school was not a foreign presence, placed in our midst and organized and regulated by some faraway alien uncomprehending authority. It was our school. It was our community. And this was our country, at least in part, and hopefully becoming more so.

For most of the time that I was growing up, my family did not own an automobile. The fact that we attended a school in our own neighborhood made it possible for the children in our family to participate in after-school activities, and possible for our parents to participate in our schooling as well. Without begging for rides, which was out of the question, and without spending money which our family did not have, for bus fare. Both of our parents served as president of our school P.T.A., for a number of terms as I remember, during the years that we attended there. The neighborhood investment in the school and the school's investment in the community were both substantial, and mutually reinforcing. Our learning occurred as a natural and intrinsic part of the growing up process. The vital importance of this fact cannot be overstated.

Again, as a child I knew about discrimination. And I had experienced its alienating effects, as we all had. I knew for instance that some forms of employment were closed to us, just as they are today. And I knew that hospitals accepted, rejected and assigned patients on the basis of skin color, and that we could not buy a meal at a downtown restaurant or lunch counter, or try on clothing in some department stores; but the indignities imposed on us by a society that institutionalized racial barriers, could not and did not detract from the vital importance of our schools' relationship to the surrounding neighborhood, or our neighborhood's relationship to its schools. It was an entirely supportive learning environment, which would stand us in good stead, educationally and psychologically, in the years to come.

After grammar school I competed for and was awarded a scholarship to a private denominational high school in Delaware, a school at which there were no black teachers and few other black students. But such ethnic details were a matter of no consequence whatever. Having studied and learned my lessons in grammar school, knowing that we black people, Americans of African ancestry, were very obviously not inferior, in view of the many good and valuable lessons that I had learned from older black people as I grew up — including school and neighborhood authority figures — and competitive and comfortable in my own black skin, I could choose to attend a school in which I would be part of a tiny minority, without taking race into account at all. What mattered was what I wanted to learn, and not the shade of skin of the people around whom I was learning. This was perhaps the most important lesson of the all-black school that I attended for the first nine years of my education. With such a background to sustain me, personal relationships in the white-majority world could develop with naturalness and with ease.

The racial discriminators were the fools, the ignoramuses, the ones who concentrated on the distinctions that did not matter, who administered unnecessary hurt to innocent people, out of their own prejudice and insecurity! Our adversaries were the racial discriminators, and not the people who simply happened to look different from us. That was the legacy of my earliest years.

It was when I was in high school that the Supreme Court delivered its historic decision in the case of Brown v. Board of Education. Not least because I had begun to think of becoming a lawyer, I got a copy of the opinion in the Brown case and read it again and again. I kept it with my old school papers, in the basement of our family home; and I imagine that the copy of the Brown decision which I read as a high school student has by now crumbled and turned to dust. Just as the buoyant hopes aroused by the Brown decision have turned to dust as well.

The court case, you will remember, was initiated by a black father who sought to enroll his daughter in the public school system of Topeka, Kansas, so that she might attend the school closest to their home, within walking distance. The application was denied for reason of race.

Topeka maintained a racially discriminatory school system; students were sent to designated schools on the basis of the color of their skin. It was this racial assignment system which the Supreme Court declared unconstitutionally discriminatory, as depriving black students of their citizenship right to the equal protection of the law. A school system which presumed to make particularized racial provisions for members of minority groups was declared to be inherently unequal in its treatment of minority group students, depriving them of their Constitutionally guaranteed right to be treated fairly, as other citizens are treated.

It was this essential idea, that government should treat all of its citizens alike and not subject any of us to special racial scrutiny or racial regulation, and not play racial favorites, which set the stage for the period of domestic reform which we have come to refer to as the Civil Rights Revolution.

As a member of the Student Civil Rights Movement and later as a lawyer and as a Congressional Legislative Counsel, I was pleased to have played a role in that necessary democratic upheaval. And as an Army Officer, a university professor, a law enforcement administrator and an executive in the private sector, I have been able to make some further contribution to the achievement of equal rights, and to the necessary reconciliation of American society.

"Desegregation" simply denotes the removal of societal or governmental barriers to free-choice relationships, and the realization of equality of citizenship under the rule of law. Desegregation is permissive, it is enabling. It opens doors. It is not authoritarian. "Integration" denotes the strengthening of a society which results from desegregation, through the actuality and the recognition of mutual interdependence.

"Racial imbalance" is not illegal and not unconstitutional and not prohibited, by Constitution or statute. Racial imbalance is an utterly normal and expectable occurrence, in a democratic society which respects individual liberty.

Are Irish-Americans or American Jews balanced out equally throughout this society? Of course not. So it is with every group, including black Americans. It is only racial discrimination which distributes citizens according to racial pattern.

May government take it upon itself to balance and assign out Irish-Americans or American Jews throughout the institutions of this society, because of the ravages of the potato famine, or in continuing remembrance of Nazi savagery? To ask the question is to answer it. Are we to be made to accept the right of Irish or Jewish Americans, or Italian Americans or Polish Americans, to ethnic neutrality on the part of government, because they are white, at the same time that the right to ethnic neutrality is denied to black Americans on account of our different skin color? This is a textbook example of blatant racial discrimination.

In a society one of whose founding documents posits the fundamental equality of each individual, in a society whose Constitution guarantees each citizen the equal protection of its laws, in a society based on the principle of the unalienable rights of each and every citizen, to base governmental action on the color of a citizen's skin is a fundamental wrong. That is why the perversion of the *Brown* decision from a guarantee of each citizen's right to be free from governmental race-consciousness in the educational process, the perversion of this Constitutional right into its opposite, the use of the federal police power to make race-consciousness the fundamental governing principle in public education and public life in this country, is such a damaging assault on the rights of every American.

Thus the Brown decision's promise — school systems reflecting the diversity of the American people, in which no student would be classified or stigmatized or apportioned out on the basis of the color of his skin — has turned to ashes before our eyes.

Rather than focusing on the right of each citizen not to be assigned about because of a governmental preoccupation with racial difference, the federal bureaucratic and judicial construction of school desegregation has become inherently racialist, assigning American children to schools and classrooms on the basis of the color of their skin. "Desegregation" has become a code word for a regime of racial quotas and compulsory governmental racialism, a new American apartheid.

I am left to complain in vain about the continuing injustice of the American government's attempts to require my children to submit to the expiatory indignity of being assigned to school on the basis of their race, in order to remedy supposed educational inequities which allegedly were caused by someone else's action, before my children were born. Upon examination, the so-called inequities most often consist of nothing improper at all, but simply the fact that in the real world school attendance patterns will usually not reflect anyone's preconceived notions of preferred racial distribution.

The purpose of desegregation and the consequent integration, of course, was to free American citizens and American society from the racial preconceptions of others, but at any rate my children cannot rationally be presumed to have participated in some questionable act committed prior to their conception. To sentence them therefore, without bringing them to trial, to submit to the racialist penalty of being assigned to a particular school for reason of the color of their skin — because of a past which they had no share in shaping — is a purported remedy which wounds the victims more than the perpetrators of the injustices of the past. To assign children to school by race, is a remedy which is itself an injustice. Any race-based remedy is inherently and by definition racially discriminatory.

Are all of America's children to be required to submit interminably to government apportionment and balancing and assignment of students because of their skin color? Requiring innocent parties to atone without ceasing, for sins which some unknown numbers of their parents may possibly have committed in years past? So much, at least, for respect for law, or justice, or even common sense and common decency.

Are my children forever to be restrained from competition for the promise of America — without government's demeaning interventions — in their own native land? Are they, generations of whose ancestors lie buried in American soil, to be eternally prevented from competing on a free and equal basis, for a respected place of equality at America's table — at which chairs are provided more equally for such a broad assortment of latter day immigrants from Europe? What crimes have my children and other minority children committed, to justify attainting them from the moment of their conception with government racial regulations and racial quotas and racial controls and ethnic apportionment schemes — condemning them to be endlessly and interminably dragged through the judicial spectacles of this country in "class action" litigation? A degrading scramble for their assigned allotment of racial scraps and tatters.

To so distort the representative and democratic balance of this country's legal and Constitutional heritage — in order to set in concrete the active racialism which distributes and apportions American citizens each against each, setting us off one against another, balancing and directing Americans in totalitarian lockstep according to the color of our skin — is to reject popular sovereignty and citizen equality and to choose instead undemocratic and compulsory racial controls, and the resulting perpetual conflict. Make no mistake of that.

Make no mistake as well, that it is very clear that the only reason that black Americans, Americans of African descent, are subjected to such especial scrutiny and "balanced" on the basis of our skin color, is the profound conviction of many in American society that we are essentially inferior to people of European descent! Black children can figure that out easily enough, being as intelligent as anyone else.

My children would therefore be well-advised to disregard entirely this society's rules and standards, for ~~they~~ my children have been prejudicially adjudged deficient from the start.

For myself, I am simply a black man and an American, and I am both black and American so thoroughly that I realize that we are after all human beings. Not degraded and pathological monstrosities, and not sociological test cases. Human beings.

As a human being I can tell you that as an Army Officer I spent two months at Walter Reed Hospital, and I ~~have~~ undergone civilian hospitalization, and been in a coma, undergone surgery, and been ~~and~~ in intensive care. In the

Civil Rights Movement I have had my life threatened. I have worked in law enforcement, and in traveling around I have been in other difficult positions from time to time.

But I had never in my life been so desperate as I became on the occasion of registering our oldest child in school.

The prospect of having a new generation of black Americans, my own children, to fall under the discriminatory yoke of the local school system's federal judge-imposed racial balance and racial quota plan, was the most bitter, the most alien antagonist that I had ever encountered. I had been recently ill, expensively ill, and as I tried to figure out how to afford the private school tuition that was the cost of buying my daughter free from the government's current racial discrimination confiscation scheme, I looked longingly toward this nation's borders, precisely as a black South African father might, when, like me, he considered his society's refusal to treat its peoples in a decent, equal manner.

Had we not been able to raise money any other way, I had decided as a last expedient to negotiate the sale of one of my eyes, if that were possible. To keep government racialism, racial balance masquerading as "desegregation," at bay for just a bit more time. Buy a purchase in blood.

I can only wonder what happened to the promise of the Brown decision; because governmental actions subsequent to the Brown decision have ordained that my children's path through school will be much more discriminatory and degrading than my own experience ever were. Despite the Brown decision, if this society has its way my children and other black children will be conditioned and indoctrinated to receive the discriminatory nigger treatment, they will be compulsorily stigmatized and humiliated as this nation's inferior breed; and this compulsory humiliation will inevitably color their perception of themselves, and their perception of their American birthright.

They will not be accorded the courtesy of a single nondiscriminatory standard of racially neutral equity, they will be apportioned out to schools and classrooms irrespective of neighborhood or family or free choice, because of the color of their skin.

And the federal contagion of numerical racial quota schemes has now been spread from our public school systems, in an attempt to infect the students in this nation's private and parochial schools as well, courtesy of the arbitrary and paternalistic ministrations of the Internal Revenue Service.

As a child I was never instructed that we black people were so congenitally inferior, that our touch was so contaminating, that we had to be dispersed among the white population for our own good, to keep us out of trouble. Our children are being taught that today.

As a child I was never instructed that black teachers had to be dispersed among the white, because of the disabilities inherent in our skin color and our adverse racial history. Our children are being taught that today. One can only imagine what American society is thereby encouraging my children to think about their father, who has been a teacher.

As a child I was never instructed that my identification with the black neighborhood which was the only home that I had ever known, was a badge of inferiority. Our children are being taught that today. And the present federal campaign to outlaw all black-run or black-majority institutions, will insure that my children will have no examples of black contributions to America, no role-models of institution-building from which they may draw spiritual sustenance. They will have only the white wasteland, the man-made desert that used to be a home.

As a child I knew from abundant evidence that those who fostered prejudice and discrimination were stupid and wrong. Our children are today being taught in the public schools of this country that all of the old, discredited prejudices are true, and that we black people desperately require preferentially discriminatory treatment, and guarantees of racial balance as a substitute for racial equality, simply in order to compete or to compare with the racially superior white population. And the federal bureaucracy are messianically impelled to use the police power of the federal government and the discretionary power of the purse, to propagate their profane dogma of perpetual black dependency and white ascendancy in our country's private and parochial schools as well.

As a child I was never instructed that because of the unfashionable color of my skin it was necessary for me to be taken away from my parents' care and adopted by the state, as it were. To be disassociated from the family of my blood, so that I might all the easier be forcibly related to the master race. In a position of proper subordination, to be sure. Our children are being taught that today.

As a child I was never instructed that I had to be transported away from the institutions of my home community in order to be educated properly. I knew better, from every fact of my own and my family's and my people's experience. But today our children are receiving such scandalously stigmatizing conditioning at the hands of the government of the United States; our inferiority is conclusively presumed and our perpetual dependency is established as the law of the land. One need not wonder at the alienation of so many black young people. Much of that alienation is generated by the actions of the federal government itself.

As a child I did not have my citizenship right to legal representation taken from me and made an item of racial and economic exploitation, by self-appointed "civil rights" lawyers, bounty hunters claiming in court to speak for my family and me, without our permission — and encouraged to use us in this manner by elements within the federal judiciary, making lucrative indeed such illegitimate "class action" litigation. For unknown, unknowing and unwilling "clients." Our children are very much the subject of such contemptuous treatment today. But of course we were kidnapped in Africa and brought here to the United States, so that we might become items of commerce.

As a child I never had to develop a prejudicial hostility to white people or to the white people's government, in order to retain my self-respect. Our children have to do that today, because why would a government dedicate itself to the invasion of family privacy and family solidarity, and to the utter destruction of every last one of the unfortunately already very few public institutions of the black community, and the lifetime entrapment of every black citizen in the tightened coils of a prejudiced and overbearing society's iron-bound concept of reverse discrimination and racial balance — unless that government is committed to our destruction.

As a child I never imagined that when I grew to manhood and became a father I should have said, at the death of one of my children, that she had at least been spared the indignities which the federal judiciary and bureaucracy have planned for our children, because of the color of our children's skin. But that was my reaction.

Our children are indeed not as fortunate as I was as a child. Not nearly. My father never had to sadly conclude that a prejudicial hostility directed against white American society was perhaps regrettable, but necessary and inevitable if his children were not to accept the current racial ideology and develop a resulting contempt for themselves and for their own people. But I have been forced to that conclusion. And I am still, against all odds, American enough to consider that something of a minor tragedy.

Senator **Hatch**. Our next witness will be Mr. William D'Onofrio who is the president of the National Association of Neighborhood Schools, an organization that has been active throughout the country in opposing school busing orders. Mr. D'Onofrio is one of the most articulate opponents of school busing as a remedy for racial imbalance.

Mr. D'Onofrio, we are happy to have you with us.

Again, we would like you to keep your testimony as short as you can—hopefully, within 5 minutes—so that we can ask more questions.

STATEMENT OF WILLIAM D'ONOFRIO, PRESIDENT, NATIONAL ASSOCIATION OF NEIGHBORHOOD SCHOOLS

Mr. **D'Onofrio**. Thank you, Mr. Chairman.

As even many proponents of forced busing now admit to the failure of city-only schemes, as social planners now point to more massive remedies—metropolitan or city-suburbs remedies—my remarks today will deal with the effects of such a sweeping order—the order by the Federal judiciary in New Castle County, Del.

An earlier witness at these hearings described New Castle County as one of the success stories of busing. My remarks will demonstrate otherwise and will magnify the lack of candor of the proponents of forced school busing.

Metropolitan or city-suburbs remedies, we are told, are supposed to inhibit white flight. After all, where can the white kids go?

WHITE FLIGHT IN NEW CASTLE COUNTY, DEL.

During the 4-year period 1971–74 in New Castle County, before the threat of forced busing enveloped the community, white public school enrollment in what was to become the "desegregation area" of 1978 declined by a total of only 6.5 percent or by some 4,500 white children.

During the 3 years 1975–77, as the case dragged through the courts and was publicized and as white parents became aware of the interdistrict intentions of the Federal courts, the desegregation area lost some 11,700 white children—in 3 years.

With its final 1978 order, the court eliminated 11 school districts in New Castle County, combining them into a single district involving two-thirds of the public school children of the entire State of Delaware, with racial balance by busing achieved in each and every school in this large area of Delaware.

During the first 3 years of actual busing—1978, 1979, and 1980—the court-created "superdistrict" lost an additional 14,000 white students. That is 25,700 white kids in 6 years, compared to 4,500 of the 4 previous years—40 percent of 1974 white enrollment.

Even in the third year of busing, with school authorities announcing that white flight had abated, white enrollment decline was still 8 percent, and the white loss in the two most affluent of the four attendance areas in New Castle County remained steady at 10 percent.

With the start of busing, all schools were balanced at 18 to 20 percent black. Now, virtually all schools in the county are over 30 percent black, and schools in the northern part of the county are over 50 percent black. This in the 3 years.

Under coercion from the court, school authorities are now preparing to reassign children to correct racial imbalances developing since 1978.

With it all, white enrollment in private and parochial schools has increased 47 percent since 1975.

EFFECT ON THE QUALITY OF EDUCATION

With the start of busing, as is usually the case under such schemes, the types and methods of testing have been changed so as to render comparisons with prebusing test scores impossible. And, since the start of busing, curiously, no test results broken down by race have been released.

However, a series of scientific polls conducted both before and after the start of busing in New Castle County by the University of Delaware's College of Urban Affairs and Public Policy clearly revealed parental perceptions and experience with regard to the effects of busing on their children.

In a poll taken in 1977 before busing began, 79 percent of the suburban parents rated their suburban school districts as "good or excellent." However, in the latest poll—the postbusing poll—only 37 percent of the same parents rated their court-created "superdistrict" as "good or excellent."

In the prebusing poll, 54 percent of the suburban parents believed that busing would "make education for white students worse." In the latest poll after busing, 57 percent felt that prediction came true. And the pollsters said: "One could say that in the eyes of many suburbanites busing has meant a leveling down of the quality of education."

On the question of whether "desegregation improved the education of black students," while 52 percent of the mostly black intercity parents polled believed that would be the case, only 38 percent felt that way in the postbusing poll—a bitter pill for the probusers to swallow.

With regard to the important matter of parental activities in the educational process, the urban affairs polls offer some grim revelations in comparing such activity before and after the start of busing.

For example, those parents helping their children with homework "often" fell from 83 to 50 percent among suburban parents and from 60 to 40 percent among inner-city parents. There were even larger declines among those parents serving as aides in the schools, visiting classrooms "often," and attending PTA "often."

Interviewing a goodly sample of parents who withdrew their children from public schools after busing started, the urban affairs poll found the following reasons ranked highest: Child not learning, 81 percent; discipline, 73 percent; curriculum, 69 percent; safety, 67 percent; quality of education lowered by busing, 66 percent; child not challenged, 64 percent.

In a series of questions asked of parents who withdrew their children and involving factors which would be "very important" in leading to a switch back to public schools, the leading response, at

73 percent, was: "if more discipline." The next, at 56 percent, was: "if more ability grouping in public schools." Ability grouping, you see, is discouraged under forced busing.

The pollsters ominously concluded—and I cannot stress the importance of this enough—"Those who have left the schools are the most concerned about their children's education and the most likely to provide leadership for the public schools."

OTHER EFFECTS ON COMMUNITY ATTITUDES

But those parent leaders are gone, driven away by the essence of forced busing—the leveling down of the quality of education to the lowest common denominator.

In handing down its order eliminating 11 school districts, the court also eliminated 11 school boards and 55 school board members, replacing them with a single, 5-man appointed board.

The first of these appointed positions expired in 1980, and voters in the attendance area involved had their first chance to participate in a school board election since busing began. Five percent of the eligible voters went to the polls.

Now, the Delaware Legislature, pending court approval, has moved to break up the "super district" into four districts, with no effect on the racial balancing aspects.

This past January, about 7 percent of the eligible voters turned out to vote for school board members for the proposed four districts. Then, just this past May 18, with additional school board elections in three of the four proposed districts, only 2,600 voters out of some 200,000 voters—a little more than 1 percent—bothered to vote.

It was a different story last October, however, when New Castle Countians had their first chance since the start of busing to vote on a proposed school tax increase. Under duress from the court, the State legislature, sidestepping a referendum, had raised suburban school taxes in 1978 by an average of 50 percent to help pay for the cost of busing.

Using this sparse voter turnout of the earlier school board election as a guide—or so they said—officials failed to provide enough polling places for the tax referendum, and thousands of voters were discouraged from voting by long lines. However, those who did vote did so with a vengeance; 53,000 people voted, many standing in long lines for up to 2 hours, and the school tax increase was defeated 47,400 to 4,800—a margin of 10 to 1.

The State's largest newspaper, a staunch advocate of forced busing and an obfuscator of the effects of that policy, now wails editorially about the stark contrast in voter zeal as concerns school board elections and the school tax referendum.

CONCLUSION

In conclusion, this then is the model metropolitan remedy—New Castle County, where forced busing works, without a single act of violence by any adult. You could not find a clearer example of the Federal judiciary's arrogance or of the failure of this outrageous policy of racial balance busing.

I hope I have made my point—that forced busing is no more of a success when it crosses city lines. The American people, Mr. Chairman, have been more than patient with this perhaps the most ridiculous ever of Government policies. Indeed, forced busing is a policy of coercion by Government that has no place in what is supposed to be a free society.

It is my hope that these hearings lead to the Congress swiftly moving to end the policy of racial balance busing and to do so by simple majority legislation built around congressional powers under articles I and II of the Constitution and section 5 of the 14th amendment.

Thank you.

Senator HATCH. Mr. D'Onofrio, in my opening statement for the first day of hearings on this subject, I remarked about the unique political aspects of the school busing controversy. I stated at the time:

> Each new Federal busing order has been accompanied by waves of local protests and controversy, school boycotts, disruptive activities, racial animosities, and political turmoil. Just as regularly, however, these passions seem to subside.

Some argue that they subside because busing comes to demonstrate its value, while others argue that they have subsided because the protesters have voted with their feet by fleeing communities or enrolling their children in private or parochial schools.

What are your thoughts on busing as a purely political phenomenon? Can communities sustain their interest in this issue for significant periods of time? Do you, for example, still have chapters in places like Detroit or Charlotte?

Mr. D'ONOFRIO. We never had chapters in Detroit or Charlotte. We do have sustaining chapters in Boston, Louisville, Omaha, Texas, and places like that, and we do a pretty good job, I think, in New Castle County.

Addressing one of the points you made, I think apathy is mistaken a lot—apathy and just plain hopelessness on the part of citizens is mistaken a lot and called success of busing.

Senator HATCH. I think you are familiar with Prof. Lino Graglia's contention that our courts began to go wrong when the Supreme Court handed down its second *Brown* decision.

In that decision, according to Professor Graglia, the Supreme Court exhibited for the first time the tension between commanding a school district to discontinue discriminatory policies and commanding them to undertake affirmative actions to integrate themselves.

Would you agree with this thesis?

Mr. D'ONOFRIO. Of course, I have to agree with Professor Graglia. I would agree that where the Court went wrong was in the remedy that they came up with. I think there are a lot of more viable remedies than forced busing.

Senator HATCH. What are your views with regard to Representative Mathews' and Professor Curtis' view that school busing has contributed to a significant deterioration in the quality of student extracurricular activities? Has this been the case in Delaware?

Mr. D'ONOFRIO. It stands to reason, it almost has to. They have tried to keep these programs intact with special buses and so forth. But the time factor weighs heavily. You cannot bus kids all over the place and take a good 1 hour or 1½ hours out of their day and expect them to continue to participate in these activities. That also applies to their parents.

Senator HATCH. Could you also elaborate upon your view that a disproportionate number of the most civic minded parents tend to remove their children from public schools in response to school busing orders?

Mr. D'ONOFRIO. Yes. Of course, I pointed out the massive enrollment decline in New Castle County, and I have pointed out that the Urban Affairs poll found that these people were the parent leaders of public education.

Incidentally, that same poll discovered that those who have removed their children from public schools are no more racially bigoted than those who remain.

Of course, the cases are legion of the proponents of busing withdrawing their own children from public schools. A notable example is Dr. Kenneth Clark who was one of the proponents of busing in the *Brown* decision. They asked him why he withdrew his kids from public schools, and he said: "I can't take that chance with my children."

Senator HATCH. I notice we have our ranking minority member on the full committee here, Senator Biden. We are very pleased to have him here. He has been a particular leader in legislative approaches to this subject.

Senator Biden.

STATEMENT OF HON. JOSEPH BIDEN, A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator BIDEN. Thank you, Mr. Chairman.

I want to thank you again—you know, I am not a member of this subcommittee—for allowing me to sit in on this. I also thank you for accommodating the subcommittee's schedule. I realize that we have asked a lot by asking you to put as many Delawareans on the scheduling list as you have, and for that I thank you.

Senator HATCH. We are happy to do that.

Senator BIDEN. It was not an idle thing, though, to ask Delawareans to testify. Obviously, there is a parochial reason for that. As I represent Delaware, I would like you to hear from Senator Arnold, Mr. D'Onofrio, and even Senator Holloway who said he wanted to testify.

I notice, of late, Delaware is being pointed to as the example of how it works. I think Delaware is a shining example of how busing does not work, and that is why I think it is particularly useful.

Without my speaking more—and I promise I will not interrupt with many questions—I would like to ask Mr. D'Onofrio to expand on one point that I think is central to the cause of those who still believe busing has some merit.

In the first of the hearings that the chairman called, Mr. D'Onofrio, my opening statement which indicated that busing did not work—and Wilmington was the example—was challenged by several of the witnesses, one in particular.

I noticed that one of the things that people are saying as evidence as to why things worked in Delaware is that we were not violent—it was pointed out that there was no violence in Delaware, that people had been orderly, there had been no major disruptions such as there were in many other localities, almost all others. Because it did not happen in Delaware, somehow that seems to be at least an underlying contention that it works.

My first question is this—and I realize you are not a lawyer, and I realize neither one of us is a social scientist, but you have been involved in this a long time. I would like you first to give me your opinion as to why you think Delaware was not violent—why there was no violence and what that means.

Second, you mentioned apathy. The chairman asked you a question on why, once there is great hoopla when a busing order is coming down, in the first year it comes down, things fall off. My assertion is that it is not apathy, but that it is absolute, total frustration. The people who can get out have gotten out, and the people who cannot get out figure there is nothing they can do about it anyway. So it is not really even apathy, it is just a frustration; they do not know what to do, so they just resign themselves.

Could you comment on both those points—why no violence, and what you would attribute as the reason for there being no great outcry at this very moment?

Mr. D'ONOFRIO. Certainly, Senator, I would be pleased to.

On the lack of violence in New Castle County, I think much of the credit, ironically, goes to the antibusing movement. Once again, I will fall back on the Urban Affairs polls.

We formed a group called Positive Action Committee which had up to 11,000 members in New Castle County, and that is a lot of members in an area involving about 300,000 people.

The poll even suprised those of us in PAC. It proved we had contacted or touched an inordinate number of people, both in terms of their attending our public meetings but mostly from the distribution of our literature door to door.

We tried to convince these people that the way to stop busing was through the democratic process—through the Congress, through their elected officials. I think this had a significant effect on there not being any violence in New Castle County.

Beyond that, the people in New Castle County are just good people.

Senator BIDEN. One of the things that is often cited is that because of the omnipresent Du Pont Co.—and it is, Mr. Chairman, more than a minor factor in Delaware——

Senator HATCH. I am aware of that.

Senator BIDEN [continuing]. That it had a positive influence in the sense that there were so many white-collar, middle-management people who were upset about the busing but knew that if they appeared on channel 3 television news network standing in front of a bus, it might make a difference in terms of their standing in the company. Do you think there is anything to that?

Mr. D'ONOFRIO. There always is. Of course, in Positive Action Committee, our local group, we had people involved who were Du Pont employees and they did not hesitate to speak out.

Senator BIDEN. I do not mean about speaking out, I mean about the violence. The reason I bother to raise it is, in jurisdictions where there are overwhelmingly dominant business influences of a single company—whether it be Rochester, N.Y., or Wilmington, Del.—and you can go through a whole number of cities where it is not quite a company town but as close as you can get.

If that company also acts responsibly, that has a positive impact—I have had that mentioned to me many times, and I wondered whether, in your view, that makes sense.

Mr. D'ONOFRIO. It is probably overstated, even as it applies to Delaware, whether the Du Pont Co. influence is dominant. Not everybody in Delaware works for the Du Pont Co.

A lot of the people who you might have thought would have been violence prone in this certainly did not work for the Du Pont Co. We have two large auto plants—not to cast any aspersions on any particular group of people, but we have two large auto assembly plants and a lot of other industry there.

Let me say that these so-called community leaders, including the newspaper, put a lot of effort into keeping the lid on the community. They had luncheon meetings, breakfast meetings, and so forth. But I do not think they touched the type of people that we did. I do not think any of these efforts by the so-called community leaders could have touched the people who might have been prone to violence.

Senator BIDEN. I think you are probably right about that.

My second question—and I promise I will not ask any more of you—is about the apathy. Is it frustration or apathy? Is it that they do not care any more, or is it that they just have given up thinking they can change anything?

Mr. D'ONOFRIO. I ad libbed that. That was a very poor choice of words—"apathy." It is frustration, it is disenchantment. This is one of the tragedies of forced busing. It is disenchantment and a turning off of people in our precious representative process—a lack of faith in government almost bordering on a hatred on the part of some people or at least a tremendous disrespect for the law and the courts, which is a real tragedy.

In essence, it is a sense of helplessness. People have been indoctrinated over the years that the court is all powerful. Our officials say: "You can't do anything about busing because the courts have spoken," and on and on it goes. This all contributes to this sense of frustration.

Senator BIDEN. I cannot resist one more question. It is a little bit of throwing you a softball.

Mr. D'ONOFRIO. You realize I am a hardball man, not a softball man.

Senator BIDEN. I know that.

In my experience up and down the State of Delaware and all throughout New Castle County in particular, I do not find many people—maybe it is just because they know my views, so they do not tell me—ardently supportive of busing any more. Even the probusing people seem to have lost their ardor for busing.

I view the move toward a four-district plan—forgetting the questions of four-district, whether it is good, bad, or indifferent—but anything that moves away from the original all-encompassing, broadest order seems to get overwhelming support. Is that your impression? Or do you still think there is a very strong constituency for this busing? Even though it is a minority, is that minority still intact and strong? I guess that is what I am trying to get to.

Mr. D'ONOFRIO. I do not think that the views have changed that much as concerns the proponents of busing. Of course, in New Castle County we never had too many people come out and admit they were in favor of it, for some reason. Every time they did, the PAC "shot their heads off." Everybody said they were neutral—the probusers were "neutral."

Senator BIDEN. I must tell you, Mr. Chairman, that the PAC was an outspoken group. I note that sitting behind Mr. D'Onofrio is a fellow who is equally and I guess even more active in the sense that he was there before any of us—a fellow named Mr. Venema. I was aware that they were there, and so was everyone else.

Mr. D'ONOFRIO. It just goes to show what people can do, Senator.

Senator BIDEN. That is exactly right.

I have trespassed on the subcommittee's time too much already.

Senator HATCH. We are always happy to have Senator Biden here. He is one of the genuine leaders on this issue.

I would like to keep the record open in case any other member wants to send written questions to any of the witnesses here today. We very much appreciate your coming Mr. D'Onofrio.

Mr. D'ONOFRIO. Thank you, Mr. Chairman.

Senator HATCH. Without objection, your prepared text will be included in the record at this point.

[The material follows:]

PREPARED STATEMENT OF WILLIAM D. D'ONOFRIO

Mr. Chairman, and members of the Constitution subcommittee. My name is William D. D'Onofrio. I reside in New Castle County, Delaware. I am President of the National Association for Neighborhood Schools, a nationwide citizens organization formed to stop the bizarre policy of assigning children to schools to achieve racial balance, a policy described by its proponents as "desegregation" and a policy we call forced busing.

As even many proponents of forced busing now admit to the failure of "city-only" schemes, social planners, seemingly intent on compounding such failure, now push for ambitious metropolitan, or city-suburbs "remedies".

My remarks today will deal with the effects of such a sweeping "remedy" as ordered by the federal judiciary in New Castle County, Delaware - an order described by Supreme Court Justice William H. Rehnquist as "the most draconian ever approved by the Supreme Court."

An earlier witness at these hearings described New Castle County as "one of the success stories" of busing. My remarks will demonstrate otherwise and will magnify the lack of candor of the proponents of forced busing.

WHITE FLIGHT IN A METROPOLITAN "REMEDY"

Metropolitan, or city-suburbs, "remedies" are supposed to inhibit white flight, so we're told. After all, where can the white kids go ?

During the four year period, 1971-74, before the threat of forced busing enveloped New Castle County, white public school enrollment in what was to become the "desegregation area" of 1978 declined a total of 6.5 per cent, or by only 4,527 students.

During the three years, 1975-77, as white parents became aware of the interdistrict intentions of the federal judiciary, white public school enrollment in the same area declined by 11,681 students. This is "pre-implementation" or "anticipatory" white flight.

With its final order, the Court eliminated eleven autonomous school districts in New Castle County, replacing them with a single, county-wide "super-district" containing two thirds of the public school students in the entire State of Delaware. Eliminated were the majority black City of Wilmington District and ten suburban districts, nine of which were majority white. Inner-city children are bused to suburban schools for nine of their twelve school years and suburban children are bused to inner-city schools for three of their twelve years with racial balance initially attained in each school in the county.

Then, during the first three years of actual busing, 1978-80, the court-created "superdistrict" lost another 14,018 white students.

That's 25,699 white students in six years, or 40 per cent of 1974 white enrollment. White enrollment has gone from 64,679 in 1974 to 38,980 in 1980.

Even in the third year of forced busing, with school authorities announcing that white flight had "abated", white enrollment decline was 7.9 per cent and white loss in the two most affluent of the four attendance areas remaining steady at ten per cent.

With the start of forced busing, all schools were balanced at 18-20 per cent black. Virtually all schools are now over 30 per cent black and some schools in the northern portion of the county are now over 50 per cent black. This in three years.

Because of "pre-implementation" white flight, 14 schools, all in the suburbs, were closed with the start of busing in 1978. Now, up to twenty, or more, additional schools will be closed for the 1981-82 school year, leaving only some seventy-odd of the original schools left open.

Under coercion from the Court, school authorities are now preparing to re-assign children to correct racial "imbalances" developing since 1978.

With it all, white enrollment in private and parochial schools has increased 47 per cent since 1975.

One wonders how much white public school enrollment decline would be under forced busing in New Castle County were it not for the economic impact of recent years on middle class families. It should also be pointed out, as a basis of comparison, that, according to the U. S. Census, the white population of New Castle County has decreased only 1.1 per cent over the past ten years.

EFFECT ON THE QUALITY OF EDUCATION

With the start of forced busing, as is usually the case under such schemes, the types and methods of testing have been changed so as to render comparisons with pre-busing test scores impossible. And, since the start of busing, no test results broken down by race have been released.

However, a series of scientific polls conducted both before and after the start of busing by the University of Delaware's College of Urban Affairs and Public Policy clearly reveal parental perceptions and experience with regard to the effects of busing on their children.

In a poll taken in 1977, before busing began, 79 per cent of the suburban parents rated their suburban school districts as "good or excellent". However, in the latest poll (1979), only 37 per cent rated the court-created "super-district" as highly.

In the pre-busing poll, 54 per cent of the suburban parents believed that busing would "make education for white students worse." In the latest poll, 57 per cent felt that prediction came true. Said the pollsters, "...one could say that in the eyes of many suburbanites (busing) has meant a leveling down of educational quality..."

On the question of whether "desegregation improved the education of black students", while 52 per cent of the inner-city parents believed that would be the case in the pre-busing poll, only 38 per cent felt that way in the latest poll - a bitter pill for the proponents of busing to swallow.

With regard to the important matter of parental activities in the educational process, the Urban Affairs polls offered some grim revelations in comparing such activity before and after the start of busing. For example, those parents helping their children with homework "often" fell from 83 per cent to 50 per cent among suburban parents and from 60 per cent to 40 per cent among inner-city parents. There were even larger declines among those parents serving as aides in the schools, visiting classrooms "often" and attending PTA "often".

Interviewing a goodly sample of parents who withdrew their children from public schools after busing started, the Urban Affairs poll found the following reasons ranked highest:

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Quality of education lowered by busing	66%
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In a series of questions asked of parents who withdrew their children and involving factors which would be "very important" in leading to a switch back to public schools, the leading response, at 73 per cent, was "if more discipline". Next, at 56 per cent, was "if more ability grouping in public schools".

The pollsters ominously concluded that "Those who have left the schools are the most concerned about their children's education and the most likely to provide leadership for the public schools".

But those parent leaders are gone - driven away by the essence of forced busing - the leveling down of the quality of education to the lowest common denominator.

STUDENT ATTITUDES ON DISCIPLINE UNDER BUSING

Late last year, one of the high schools in New Castle County had to be closed for a week due to racial strife - during the third year of busing. During this period, the students were brought back to school, class by class, for "orientations" aimed at getting to the heart of their concerns. The following are taken from a school compilation of the questions and statements of the students and are a commentary on the unwillingness and inability of administrators and teachers, faced with certain castigation for "discrimination" and "insensitivity", to establish and maintain discipline under a busing order:

- Black students get off easier than white students (voiced by students of both races).
- Administrators and teachers are afraid to deal with black students (voiced by students of both races).
- Administrators take too much from repeat offendors to school policy.
- Is it true that there must be an equal number of black and white suspensions regardless of who is at fault ?
- Ever since busing has started there have been nothing but problems.
- Both the blacks and whites don't want to have busing.

MORE EVIDENCE OF COMMUNITY ATTITUDES

In handing down its order eliminating eleven school districts, the Court also eliminated eleven school boards and fifty-five school board members, replacing them with a single, five-man appointed board.

The first of these appointed positions expired in 1980 and voters in the attendance area involved had their first chance to participate in a school board election since busing began. Five per cent of the eligible voters went to the polls.

Now, the Delaware legislature, pending court approval, has moved to break up the "superdistrict" into four districts - with no effect on the racial balancing aspects. This past January, about 7 per cent of the eligible voters turned out to vote for school board members for the proposed four districts. Then, this past May 18, with additional school board elections in three of the four proposed districts, only 2,624 of some 200,000 eligible voters - little more than one per cent - bothered to vote.

It was a different story, however, last October, when New Castle Countians had their first chance since the start of busing to vote on a proposed school tax increase. Under duress from the Court, the state legislature, sidestepping a referendum, had raised suburban school taxes in 1978 by an average of 50 per cent.

Using the sparse voter turnout of the earlier school board election as a guide, or so they said, officials failed to provide enough polling places for the tax referendum and thousands of voters were discouraged from voting by long lines. However, those that did vote did so with a vengeance.

53,000 people voted, many standing in line for up to two hours or more. The school tax increase was defeated, 47,423 to 4,851 - a margin of 10-to-1.

The state's largest newspaper, a staunch advocate of forced busing and an obfuscator of the effects of that policy, now wails editorially about the stark contrast in voter zeal as concerns school board elections and the school tax referendum.

CONCLUSION

This then is the "model" metropolitan "remedy". New Castle County, where forced busing, without a single act of violence by any adult or parent, "works". You couldn't find a clearer example of the federal judiciary run amok or of the failure of this outrageous policy.

The American people have been more than patient with this perhaps the most ridiculous of government action. Indeed, forced busing is a policy of coercion by government that has no place in what is supposed to be a free society.

It is my hope that these hearings lead, and swiftly so, to the Congress, exercising its clear powers under Articles I and III of the Constitution, and under Section 5 of the 14th Amendment to that Constitution, ending the policy of racial balance busing and to do so by simple majority legislation.

Thank you.

William D. D'Onofrio, President
National Association for Neighborhood Schools
June 3, 1981

Senator BIDEN. Excuse me, Mr. Chairman.

You did comment, Mr. D'Onofrio—and I am sorry to say there is a Budget Committee meeting also—on what remedy you thought best. You thought the legislative process—majority vote—was the way to get at the solution—right? I will not belabor it, but you did say that?

Mr. D'ONOFRIO. Simple majority legislation—right—clear powers of Congress.

Senator BIDEN. Thank you.

Mr. D'ONOFRIO. Thank you very much.

Senator HATCH. Thank you.

Mr. John Arnold will be our next witness. He is a distinguished member of the Delaware State Legislature. As a State senator from that State, he has served as chairman since 1975 of the Joint Legislative Committee on Desegregation. We look forward to his views on the Delaware controversy.

We have also invited one of Representative Arnold's colleagues who shares a different perspective on the Delaware busing situation to testify this morning, but I do not believe he is here.

Senator BIDEN. My office indicates he is unable to make it. We have not been notified either, but I once again thank you. Senator Arnold, I am sure, appreciates this, being in our position many times. You usually do not invite so many different people, and I feel a little embarrassed in that I have pressed upon the chairman that he invite more people and then they not show.

Senator HATCH. Do not feel embarrassed at all because your State has had particular difficulties in this area. It is important that we hear from those who feel strongly about this.

Senator Arnold?

STATEMENT OF HON. JOHN ARNOLD, STATE SENATOR, STATE OF DELAWARE

Mr. ARNOLD. Thank you, Mr. Chairman. I am certainly glad and pleased that I did get a chance to come.

What I am going to say is not so important as the prepared statement I have submitted to you. Realizing I had 5 minutes, there was no way I could tell the Delaware story, so I would urge that you go through the statement I have submitted thoroughly.

Also, if there are any questions or if you want more information, please get in contact with me or my administrative assistant, Dave Wilkins, or Jim Conaway whose name is on the facing sheet.

As was stated, I have been the chairman. I am the only minority as chairman of any committee in Delaware. I do not know how I got to be the chairman of the committee, but we took the bull by the horns and started trying to do things.

Senator BIDEN. John, if you were here you would be in the majority.

Mr. ARNOLD. Senator, you have just given me an idea.

Senator HATCH. Maybe we had better get you here to keep that majority.

Mr. ARNOLD. The committee was formed by Concurrent Resolution 51 which later became statute, forming the committee to see what actions the general assembly should take in the busing orders or in the busing program and to keep the whole general assembly informed of what was going on through the courts. It was a bipartisan committee of 12 members—6 of each.

I want to really commend you, Senator, for getting something going here.

We have come close a couple of times to getting legislation passed that might have helped us in the Delaware case. I just, again, want to thank you for allowing me to come and present this. But, briefly, let me give you the history of the Delaware case.

Senator HATCH. Your full statement will go in the record. We appreciate having you here.

Mr. ARNOLD. Thank you.

In 1954, when the Warren Court issued that the separate but equal schools were not satisfactory, Delaware was the first State to completely do away with the dual school system.

In 1968, there was the Educational Advancement Act, and over a few years Delaware's school districts went from 206 to 26 districts in consolidating and complying with the Supreme Court ruling.

In 1968, we had the last Advancement Act. The city of Wilmington's legislators indicated that they would defeat the act if Wilmington's school districts were not left alone. So the general assembly left the district intact.

A little later, there was a suit brought which said Wilmington was a segregated district.

Senator BIDEN. Senator, for purpose of clarification, for our record, would you emphasize again for the Chair and for the record what took place in 1968? What was the State legislature doing at that time?

Mr. ARNOLD. The State legislature in 1968 had the Delaware Educational Advancement Act.

Senator BIDEN. What was the purpose of that act?

Mr. ARNOLD. To reorganize the school districts.

Senator BIDEN. And the legislators who represented the city of Wilmington, including the black legislators—how did they vote on Wilmington being broken up as an integrated district?

Mr. ARNOLD. They voted against it, they opposed it, and they threatened to defeat the complete act if it happened.

Senator BIDEN. Thank you. I think that is worth emphasizing in the record.

Mr. ARNOLD. Thank you, Senator.

So Wilmington was left as one complete district at Wilmington's insistence.

In 1978, the court order came down. The court ordered 11 school districts dissolved and merged into 1. I did then and I still contend that the judge did something that constitutionally he could not do.

Seventy-six thousand students at that time were in the school districts involved. Now, there are 55,000, and it is going down.

Before that, Mr. Chairman, the Deseg Committee, as I refer to it, instituted a volunteer plan. We had a volunteer plan before that, but the dissenting district had to agree, and Wilmington would not agree to allow any students to voluntarily go out.

So the new volunteer plan that we instituted took it out of the hands of the dissenting district. They had no choice. If a child wanted to go out, he had to go.

Mr. Chairman, we had one district that went from 0 minority to 20-percent minority on the volunteer plan.

Senator HATCH. Mr. Arnold, I hate to interrupt you, but I am going to have to ask Senator Biden to chair the remainder of the hearings.

I have got something extremely irritating in my eye. I have been trying to get it out all moring, but I cannot, so I am going to have to head back to my office and see if I can wash it out, I do not want to scratch my cornea.

Senator Biden, if you would continue this hearing, I would really appreciate it.

Of course, our last witness—let me just mention who that is: It is Gary Orfield who, of course, is a professor of political science at the University of Illinois and one of the Nation's most respected authorities on the other side of this issue, whom we have reserved till last because of the number of people who are against his position, including yourself.

If you will forgive me—I am very interested in your testimony, and I will read the record and make sure that I am fully up on it. And I appreciate Senator Biden's helping me out in this instance.

Senator BIDEN. I am happy to do it, Mr. Chairman.

Senator HATCH. Thank you very much Senator Biden. I apologize for having to leave now.

Senator BIDEN [acting chairman]. I am sorry, John, to get you all the way down here to talk to me, but it will go on the record.

Mr. ARNOLD. That is all right, Senator.

What I wanted to continue with just for a few seconds was that quality of education has gone down the drain, public confidence is lost, teachers are not enthused at teaching any more—they have a job, and that is what most of them are doing.

The declining enrollment is still continuing. The cost of the first year was above $3.5 million. A judge ordered the State Treasurer to write a check for $1 million to buy new buses. Safety in transporting kids—the accidents have doubled, mostly because of the increased amount of busing.

To wrap up my part, I would like to make a couple of comments: Busing is not the way to insure equal educational opportunity, and I encourage you to continue, by constitutional change, by legislation, or whatever it takes to put a stop to this waste of money, waste of valuable time of the children, and waste of natural resources.

I urge that we continue to move to put a stop to this, or the public school system in this Nation will go down the drain.

Memphis, Tenn., now has a public school system, but their public school system now is a black public school system because of private schools. Private schools have increased tremendously in Delaware, and they are still going.

I would wind up my comments at this point and be available for questions.

Senator **Biden**. Thank you, Senator. I have two questions.

You have experience beyond the issue of busing in the area of education in the State of Delaware. One of the things that I think is important for us as we are attempting to draft legislation is, as you know, the so-called Roth-Biden bill, which is a legislative approach. It failed by a single vote last time.

The real issue here in the Congress is whether or not we go the attenuated route of a constitutional amendment which requires, as I need not explain to you, literally throwing it back to the Delaware Legislature and every other legislature for a two-thirds vote here and a three-quarters vote there, and a longer time; or whether we come up with a legislative solution and what that solution should be.

I just want to be clear on this before you leave, in light of the fact that you came all the way down here: Give us your views as to which approach you believe, as a Senator with some experience in this, is the best approach for us in the Congress to be moving toward.

Mr. **Arnold**. Senator, I believe that immediately we should go for the legislative action and follow through with a constitutional amendment that would make it permanent. Also, that takes it longer to get it done.

Senator **Biden**. My second question relates to your experience as a State legislator that extends beyond the busing question, and that is the state and condition of the public schools.

I, like you, have a very negative view about busing. I wonder if, as a legislator, you could share with us for a minute your view of the state of the public school system even before busing—whether it was all that good and how much better it would be if we did not have busing.

In other words, I am a little reluctant—I do not want to overstate our case for purposes of credibility.

It seems to me that the public school system is in dire trouble, even in areas where there is no busing—that there is real difficulty; difficulties with discipline; difficulties with basic reading, writing, and arithmetic.

I know that you and the Governor and the State legislature have worked very hard on "back to basics" approaches and a range of other things that affect other parts of the State that are not affected by busing. I wonder if you could tell us a little bit about the state of public education?

Mr. **Arnold**. Senator, I do believe that what you are saying is true—public education has more problems than just the busing. It is true. I think we have got to get back to basics, and the more talented maybe should go on to other things, but we have got to get back to educating the children totally. It would not have been as bad.

One of the reasons I support the four-district plan now and fought for it is that you have got to get the public confidence back in the system. If you do not do that, nothing we can do is going to save it. That is why I worked hard to divide the one district into four districts and hope it will stay.

Senator BIDEN. One last point—in your capacity as a State senator, although you represent New Castle County, you vote on a number of education issues that relate to our other two counties. Has there been any comparative study made by the State legislature on the performance, attitudes, and discipline of the students in Kent and Sussex Counties versus those students affected by busing in New Castle County? Do you know?

Mr. ARNOLD. I do not know of any, Senator.

Senator BIDEN. Do you have any impression? I am not suggesting you should, I just wonder if you have any impression of whether or not there has been a commensurate decline.

My thesis is, even if busing is a net wash, even if it is not negative, I do not think we need prove that busing has a negative impact upon the schools to eliminate busing. I do not think that is a necessary requirement for us to eliminate busing.

Busing makes no sense from a constitutional standpoint, in my opinion. It makes no sense from a standpoint of whether or not it is the best way to improve education.

The reason I am bothering you with these questions—and they are not just idle—is that I do not want to have to be in a position to build a case to prove that busing hurts the educational system. Even if it did not hurt it—if things were just the same—it is a failure.

Mr. ARNOLD. I agree.

Senator BIDEN. That is why I am trying to get a sense of how it relates to other counties in our own State. Again, there is no reason why you should necessarily know that. I just thought you might have an impression as to whether or not there is a distinct difference between a high school senior in Sussex County and his reading level, mathematic achievement, et cetera, and a high school student going to Brandywine High School.

Mr. ARNOLD. I believe, Senator, that in the past, when we did have comparative scores, your high scores came from New Castle County, but there are different reasons why that might have happened.

I believe that one of the problems we are facing is that in many cases the brighter students are leaving the school district because they want an education. The parents that are involved and want their children to have an education pull them out to where they can get an education. That will destroy the system.

Senator BIDEN. Senator, if, in fact, it were shown to you, as a State legislator, that any subdivision within our State or the State legislature or school boards—since we can only really talk about the lower two counties as there is a "super-district" in New Castle County—if any governmental or quasi-governmental authority got together for the express purpose of drawing school district lines that would exclude black children from attending—that they jerry-rigged the lines, that they got together and said: "We are going to change the school district, and our purpose in changing it is to keep black folks going to one school and white to another"—if that circumstance occurred, do you believe that Government or the courts should step in to stop that practice?

Mr. **ARNOLD**. Absolutely.

Senator **BIDEN**. And that it must do whatever it takes to eliminate that practice?

Mr. **ARNOLD**. That is right.

Senator **BIDEN**. But you are suggesting that even where that exists, that busing may not be the way to do that—you would maybe just draw the school district line a different way or make other alternatives—is that what you are saying?

Mr. **ARNOLD**. Draw the school district lines and have neighborhood schools—that is the way to do it.

Senator **BIDEN**. All right. Sometimes, there are those who suggest that merely because we are against busing we do not support *Brown* v. *The Board of Education* and the concept that "separate but equal" is not equal. We are not arguing about that, are we?

Mr. **ARNOLD**. No, Senator. In fact, we have gone beyond that. *Brown* says "separate but equal" is not legal and you should not bus beyond your closest school to your neighborhood. We are doing that. We are going far beyond what *Brown* said, in my opinion.

Senator **BIDEN**. I appreciate your testimony and your time.

As the chairman indicated, your entire statement will be inserted in the record and made part of the public record at this point, without objection.

[The prepared statement of Mr. Arnold follows:]

PREPARED STATEMENT OF
HONORABLE JOHN H. ARNOLD
MINORITY WHIP
SENATE
STATE OF DELAWARE

JUNE 3, 1981

New Castle County, Delaware presents a unique example of how pervasively disruptive, if not totally destructive, of an educational system a federal court intrusion can be when that intrusion includes imposed mandatory busing of public school children for the sole purpose of remedying what the Court has found to be a racially discriminatory and segregated public school system. In fact, the New Castle County experience also teaches us how unfortunate it is that the Federal Courts have to become involved at all in what even those Courts concede is primarily a matter of state and local interest and concern -- namely, public school education.

In matters of litigation, the Courts can address themselves only to specific issues raised before them. In public school segregation (or desegregation) cases, the issue is whether or not there is a racially discriminatory public school system. The issue is race. It is not quality of educational programs or of the actual teaching and learning which goes on in the public schools. Thus, the Courts in these cases decide the cases only on the basis of race. The question is whether or not the operation of the particular school system has actually and in fact resulted in a racially identifiable school district, or racially identifiable schools within the same school district.

Indeed, in the litigation involving the desegregation of the New Castle County public school system the Federal District Court expressly said:

> "We were urged throughout the hearings in this case to be concerned with the 'quality of education' offered by the area schools. That is much more properly the concern of local officials and the parents of children in the schools. Our duty here is not to impose quality education even if we could define that term, though we must be conscious that the implementation of the remedy does not defeat the ability of local agencies to fulfill their duty to offer it. We do not find in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), a mandate for District Courts to concern themselves with how well the educative function is performed."[1]

So, while the Federal Courts go about their business of imposing public school remedial programs upon the state and local school authorities and systems, with their primary purpose being to eliminate what they have found to be racially identifiable schools or school districts, they do not permit the question of the quality of the educative function to interfere with their task. As the Court so frankly said in the above quotation, the United States Supreme Court in the landmark Brown decision[2] did not mandate that the Federal District Courts had "to concern themselves with how well the educative function is performed."

But the same Court in the same opinion also recognized that "The operation of public schools is traditionally a matter of local concern, and rightly so;"[3] and it recognized the duty of the local school agencies to provide "quality education."[4]

With the Federal Courts having and exercising the overriding constitutional power to remedy federally racially unconstitutional public school discrimination and segregation, and with those Courts not having -- in the words of the same Court -- any "duty" to impose quality education or to concern itself with quality education but rather merely to remedy the violations which are based solely on race, it is no surprise that in many cases the federally imposed public school desegregation remedy will drastically and adversely affect the quality of education for all students regardless of race in the affected geographic area. Such has been the result in New Castle County, Delaware, in no small measure because of a massive mandatory busing system[5] put into effect by Court order as the "key" to its desegregation remedial process.

I will come back to the terribly adverse effects of this busing system. At this point, it would be wise to review the history of desegregation litigation in Delaware, and in New Castle County in particular. Such a review will show how constantly enmeshed the federal judiciary has been in the state and local educative process for more than 20 years. In this review I am not attempting to re-argue the legal or factual issues decided, or not decided, during the litigation. Rather, I am trying to show that even assuming a wrong that requires correction, the corrective steps which have been utilized have almost killed the patient. The desegregatory process imposed by the federal judiciary has produced serious side-effects which have drastically had an adverse effect on the quality and extent of the educative process in New Castle County for students of all races.

Moreover, the review of the litigation will show that at all of the critical litigation stages throughout the years, the decisions have been by a one-vote majority -- two-to-one, or four-to-three. A swing vote of one the other way would have probably resulted in much different treatment of the problem.

My purpose is also not to "rant and rave" against the federal judiciary. I am a strong believer in the judicial system of our country, although I do not believe it is so sacred or perfect that it cannot be criticized or improved. In this instance, the one-vote majorities have been rather severely criticized by their own brethren on the bench, so even if I were otherwise inclined, it is not necessary for me to be critical.

Accordingly, I will try to be basically factual in outlining this long and rather complicated history -- and I will limit my review only to the highlights, of which there have been many, as the review will show.

New Castle County is the largest of Delaware's three counties. It occupies 435 square miles. Its population according to the 1970 Census was approximately 386,000. The only municipality of any appreciable geographic or population size in New Castle County is the City of Wilmington, which occupies about 15 square miles of the 435 in the entire county. In 1970, Wilmington's population was about 80,000. In 1970, 12.2% of New Castle County's population was black while 43.6% of Wilmington's population was black and 4.5% of suburban New Castle County was black.

Between 1950 and 1970, the suburban population had increased fivefold and the percentage of black residents in the suburbs had declined slightly. During the same period Wilmington's population had decreased in absolute terms (from 110,000 in 1950) but its proportionate black population had tripled. The result of those demographic changes, of course, was that in 1970 the black population in New Castle County was heavily concentrated in Wilmington.

There were a total of twelve full public school districts in New Castle County in 1970.[6] The City of Wilmington itself constituted one complete district, and the City itself designated the members of the School Board. It was the only public school district which had been separately chartered by the State legislature and this had been done at the instance of Wilmington and not of the legislature.

The Wilmington School District was also the "richest" of all the districts in New Castle County. It had the highest property assessment tax base, imposed the highest school tax rate and paid the highest salaries to teachers.

In 1978 after years of litigation, the Federal Court's imposed desegregation plan went into effect in New Castle County. The plan wiped out eleven of the districts as separate and distinct entities and abolished their school boards (each of which had at least five members). Only one rural district at the southwestern corner of the county, and part of another district which ran over into Kent County, were omitted from the Court's plan. Thus, the plan combined the former Wilmington District and ten former suburban districts into one single district, governed by a single board of five persons.

The school population in this desegregation area for the 1977-1978 school year had been 72,590 in grades K-12. Of those, 16,187, or 22.3%, were black, the overwhelming majority residing in Wilmington or in the suburban DeLaWarr District (which had about a 50/50 black/white school population). Of the total of 77,590 total school students, between 21.5% and 22.9% lived in the two predominantly black districts.

New Castle County has been involved with public school desegregation matters since 1952, when the Delaware Supreme Court ordered two New Castle County suburban districts to immediately admit black students from Wilmington because of what the Court found to be de jure racial segregation of the Wilmington School District.[7] That case was then combined with the Brown v. Board of Education litigation in the United States Supreme Court. As everyone knows, in Brown the United States Supreme Court overturned its long-standing ruling that separate-but-equal public schools were constitutional and ruled that separating students on the basis of race was per se unconstitutional.[8]

Promptly after the ruling in Brown I, Delaware formulated a policy designed to bring about the racial desegregation of the public schools in New Castle County but on a gradual, deliberate schedule which would disrupt only as much as necessary the ongoing education program and policies which were believed to be good, quality programs and policies for all students. The Delaware Supreme Court approved this policy.[9]

In 1957, a group of black Wilmington students, through their parents, petitioned the United States District

Court for the District of Delaware and joined the Delaware State Board of Education as defendants. They complained of the failure of one particular suburban district (not in New Castle County) to admit black students on a racially nondiscriminatory basis and they later complained that no appreciable steps had been taken by the State Board in the entire state to comply with the two Brown decisions and orders. As a result, the State Board, under orders from the United States District Court, adopted a plan to desegregate all of the Delaware public schools starting with the Fall Term of 1961. This plan was approved by the District Court.[10]

The plan involved the submission of a new school code to the Delaware legislature. Such a code was submitted to two different sessions of the legislature but was not adopted.

In 1968, the Delaware legislature passed a school consolidation and reorganization act[11] which resulted in the reorganization and consolidation by the State Board of various school districts throughout the state. That act resulted in the twelve full public school districts in New Castle County which were previously adverted to. The Wilmington School District was expressly excluded from reorganization or consolidation by the act, so it continued with its boundaries being the boundaries of the City itself.

Although that 1968 act preserved the Wilmington District as a separate district, even at a time when everyone was aware of the general racial make-up of the student population of Wilmington schools and the Wilmington general population, the United States District Court expressly ruled that it could not find from the evidence that maintaining

Wilmington's separateness was "purposefully racially discriminatory."[12] Without going into detail, there was plenty of evidence of non-racial reasons for keeping the Wilmington School District as it had been, not the least of which was the insistence of the District itself that it not be tampered with in the consolidation and reorganization under threat that all members of the legislature from Wilmington would otherwise vote against the consolidation and reorganization (thus ensuring its defeat).

The Federal District Court had retained continuing jurisdiction over the defendants in the Evans v. Buchanan case, following the Court's approval of the plan for desegregation adopted by the State Board for the Fall term of 1961. Hence, in 1971, the plaintiffs again petitioned the Court in the case, this time limiting their complaint to New Castle County. They made three contentions:

1. The State Board maintains a racially discriminatory dual public school system in New Castle County, including Wilmington, with Wilmington being a racially segregated district;

2. The consolidation and reorganization act of 1968 passed by the Delaware legislature unconstitutionally confines Wilmington students to Wilmington schools;

3. Delaware through its customs, laws, useages and policies, has enforced, approved and acquiesced in public and private discrimination resulting in segregated public schools.[13]

Soon thereafter the Wilmington Board of Education joined in the suit as an intervening party plaintiff, even though there had been prior findings that it itself had been guilty of racial discrimination among its own schools in its own district.

There then followed a series of court opinions. A lengthy trial was held in late 1973. At the time of the trial, the desegregation area had a total student population of 83,800, of which 66,900 were white. The United States District Court had been converted to a three-judge court for these hearings and decisions, because of the attack on the state 1968 act as being federally unconstitutional.

The Court in 1974 held that de jure black schools (i.e., in Wilmington) still existed and were racially identifiable and thus racially segregated schooling had not been eliminated in Wilmington and that a dual school system therefore existed. The Court directed the parties to submit alternate desegregation plans (a) within the then existing boundaries of the Wilmington School District and (b) incorporating other areas of New Castle County.[14]

Then after another lengthy trial on remedy, the three-judge court -- by a two-to-one vote -- ruled that the 1968 state act was unconstitutional because it did confine Wilmington students within the boundaries of the City of Wilmington without regard to the motivation behind the passage of the act. In addition the Court found that the state and local authorities (and incidentally the federal authorities also) had placed their "power, property and prestige" behind the white exodus from Wilmington and the widespread housing discriminating patterns in New Castle County by, among other things, condoning and/or encouraging discrimination in the private housing market and providing public housing almost exclusively within the confines of

Wilmington and thus there had been inter-district discriminations and violations. The Court again ordered the parties to submit alternate desegregation plans (a) within the boundaries of Wilmington and (b) incorporating other areas of New Castle County.[15]

This ruling went up to the United States Supreme Court on appeal and the Supreme Court summarily affirmed without any opinion -- by a four-to-three vote. The three dissenters wrote an opinion in which they said, among other things:

> "By reason of the summary nature of the Court's actions ... neither the parties nor the District Court can know what additional effect the affirmance may have ...
>
> . . .
>
> "... My dissent from that sort of affirmance is based on my conviction that it is extraordinarily slipshod judicial procedure as well as my conviction that it is incorrect."[16]

Thereafter the parties submitted alternative desegregation plans to the three-judge District Court, and a lengthy trial was had on the various plans. The Court then entered another decision, this time ruling that an inter-district remedy would be required because the suburban districts had been utilized by the governmental authorities to assist in the racial segregation of black students in Wilmington and thus there were inter-district violations. The Court -- again by a two-to-one majority -- decreed that there would be a single district comprising the area made up of the City of Wilmington and eleven of the twelve full New Castle County suburban school districts, with a governing

Board of five persons to be appointed by the State Board, with the Court specifying the geographic areas from which each member must be appointed. The Court provided that its plan could go into effect over a two year period, with desegregation of the high schools and intermediate schools to go into effect in the Fall of 1977 and desegregation of all grade levels to be effective in the Fall of 1978.[17]

The District Court also held that the State could redivide the desegregation area into smaller districts or governmental units if it could do so without frustrating the desegregation objective. The District Court then summarily disbanded itself as a three-judge Court.

Of course, at this stage of the litigation, and because of the summary affirmance by the United States Supreme Court of the finding by the District Court of an inter-district violation, no one was certain just where the case stood on the question of liability and of remedy. The fears and concerns of the three dissenters in the Supreme Court proceeding were clearly justified.

There was a very prevalent belief that ultimately the United States Supreme Court could have presented to it for reflective and not summary decision the issues of violations and remedy. There had never been a court finding of intentional racial discrimination in the schools of New Castle County -- instead, the District Court had held that if the "effects" of state and local action were racially identifiable schools or school districts, then "intent" or "purpose" was not relevant, and the Court had found such racially identifiable schools and school districts to exist.

But there was much respectable legal opinion that more than just "effects" was necessary -- that a finding of purposeful or intentional racial discrimination was required -- and that the United States Supreme Court would so hold when the issue was presented to it. So it was believed there was still a reasonable opportunity to have that question put to the Supreme Court and if it were to be done successfully, then there was a very good chance that the ruling on violations by the District Court would be reversed.

Moreover, the rule on remedy was that the remedy was to be broad enough to remedy the violations found but no more. The remedial decree should be directed towards placing the victims of discrimination in the position they would have occupied if the constitutional violation had not occurred.[18]

Because the District Court had never taken evidence on, and had never ruled on, the question of the position the black Wilmington students would have occupied if the found violations had not occurred, it was also believed by respectable legal authorities representing the State that the Court's decision to order an eleven inter-district remedy was not supportable and would be overturned once the case could get to the United States Supreme Court in a proper posture.

Accordingly, there was reluctance on the part of the State to become intimately active and involved in the Court's desegregation remedy, when to do so would risk what appeared to be a good opportunity to have the District Court reversed with a return back to the original eleven districts, at which time the State could then hopefully put forth a reorganization and consolidation of school districts which would preserve the tradition for relatively small districts while yet eliminating any vestige of racial discrimination -- real or perceived -- in Delaware.

In the meantime, however, the State enacted a voluntary student transfer plan between the New Castle County School Districts, designed to encourage black students in Wilmington to transfer into suburban districts, with the State providing and paying for their transportation. Respectable numbers of black Wilmington students took advantage of the voluntary transfer plan.

In addition, after the District Court ruled that the voluntary transfer plan was not an adequate remedy because it could not guarantee desegregation of the entire area "now", the State promulgated and adopted a "reverse volunteerism" plan by which all Wilmington students were assigned to suburban districts[19] but were given the opportunity to "opt" to stay in Wilmington, even up to after their first year in a suburban district; and the process at their election could take place again so that they might try a different suburban district the second time. All transportation would be provided and paid for by the State.

The District Court struck down the "reverse volunteerism" plan on the ground that it discriminated against the Wilmington students, who were predominantly black, by requiring them to engage in all the transportation.

The decision of the three-judge Court holding that there would be a single district comprising the previous eleven districts, was appealed to the Court of Appeals for the Third Circuit. By a four-to-three decision, the Third Circuit generally affirmed the three-judge finding.[20] It held that the 1975 United States Supreme Court summary affirmance of the previous District Court order was binding on the Third Circuit as an "inferior" Court and that if the summary nature of the affirmance meant that the matters in the prior District Court opinion could still be considered, such contention had to be made to and decided by the Supreme Court and not by an "inferior" court. The one-judge majority in the Third Circuit then affirmed the three-judge holding (which itself was by a one-judge majority) that the area of the eleven districts would be converted into a single district governed by a single board but it struck down the use of racial quotas in determining pupil assignments in the various schools in the court-created "super-district".

The three dissenting judges in the Third Circuit made the following observations, among other things:

> "I must confess that if I were a Delaware official charged with desegregating the schools of northern New Castle County 'in accordance with the Opinion of the Court of Appeals for the Third Circuit,' I would not know where to begin.
>
> "The majority opinion correctly observes that the remedy in this case must return the 'school system and its students . ., as nearly as possible, to the position they would have been in but for the constitutional violations that have been found.' (Emphasis added.)" 555 F.2d 383-384.
>
> "However, the majority opinion does not identify those interdistrict violations which have been found in this case and which require a remedy. It interprets the Supreme Court's summary affirmance, Buchanan v. Evans, 423 U.S. 963, 96 S.Ct.381,

46 L.Ed.2d 293 (1975), to mean that 'one or more interdistrict constitutional violations' occurred. Maj.Op. at 377. But the district court identified eight separate interdistrict violations, ...

"The majority does not reveal which of these violations it believes the Supreme Court affirmed. Nor does it explain what has become of the remaining violations. If those violations were not affirmed by the Supreme Court, then obviously they are before this Court in this appeal. The majority, however, has failed to address this question. I do not understand how the Delaware officials can possibly devise a plan to remedy the continuing effects of past interdistrict violations when the majority has failed to disclose the identity of the violations which the Supreme Court affirmed." 555 F.2d 384. (Emphasis in original) (Footnotes omitted).

* * *

"Since, under my analysis, the Supreme Court's summary affirmance reached only one of the eight interdistrict violations found by the district court, the validity of the other seven violations is before this Court in this appeal. At this time, I would not affirm the district court's findings concerning these seven violations. Instead, I would remand this case to the district court so that it could determine whether each of those violations is supported by the 'racially discriminatory intent or purpose' required by Washington v. Davis and Village of Arlington Heights." 555 F.2d at 589. (Emphasis in original) (Footnotes omitted).

* * *

"In my view, a remand to the district court is also required so that the district court can determine as precisely as possible what the racial composition of the schools of northern New Castle County would now be if those interdistrict violations found to be valid had not taken place. To put it another way, the district court should determine to what extent the

> present racial makeup of the affected schools is attributable to acts which violated the Equal Protection Clause and to what extent it is attributable to economic and social forces, to private actions, and to nondiscriminatory governmental actions." 555 F.2d at 390.

The Third Circuit affirmance was taken to the United States Supreme Court by a Petition for Certiorari. Again by a one judge majority -- four-to-three -- the Supreme Court on October 13, 1977 denied certiorari.[21]

In January 1978, the District Court -- then a one-judge Court -- issued a final remedial order declaring that the eleven districts would go out of existence on July 11, 1978 to be replaced by the "super" New Castle County School District, and prescribed a detailed desegregation plan which would go into effect on July 1, 1978.[22]

In mid-February 1978, the Delaware legislature enacted a statute authorizing the State Board of Education to reorganize the desegregation area into multiple districts smaller than the one super single district.[23] Pursuant to this statutory authority, the State Board promptly proposed a four-district reorganization plan. The District Court enjoined the implementation of this four-district plan on the ground that it came too late and would materially interfere with the Court's desegregation process which was about then to be implemented.[24]

In the meantime the District Court's final desegregation order was appealed to and ultimately affirmed by the Third Circuit.[25] A final Petition for Certiorari was filed with the United States Supreme Court in 1978 and was not acted on until April 1980, when it was again denied.[26]

Again there were three dissenters in the United States Supreme Court, and among other things they said:

> "This Court does a disservice to local government and to the people of Delaware, and very likely in the long run to the Equal Protection Clause of the Fourteenth Amendment, by once again declining to review a case of such fundamental importance."

In addition to the three dissenters, Chief Justice Burger stated his view that the case merited review by the United States Supreme Court but only when a full Court is available to consider "the important issues presented in the petition for certiorari." Mr. Justice Stevens did not participate in the consideration of or decision on the petition for certiorari.

The action of the United States Supreme Court which finally occurred in April 1980 and by which it denied certiorari, seemed to forever foreclose the right and opportunity of the State to have the Court face and decide the issues (i) of "intentional" or "purposeful" racial school desegregation, (ii) of the validity and correctness, and extent, of the series of constitutional violations found by the District Court, and (iii) of the correctness and constitutionality of the very broad scope of the remedy imposed by the District Court. Accordingly, promptly after such Supreme Court action, the Delaware legislature enacted a statute authorizing the State Board of Education to divide the super single district into smaller multiple districts.[27]

Pursuant to this new enabling law, the State Board, after thorough study and review and after public hearings, on November 20, 1980, approved a reorganization plan dividing the super single district into four smaller districts, whose present student enrollments would vary from an estimated low of 10,508 to an estimated high of 16,007.

The 1980 enabling law has been held constitutional under the Delaware Constitution by an advisory opinion of the Delaware Supreme Court addressed to the Governor of the State.[28] Thereafter, the United States District Court has ruled that the division of its super single district into the four smaller districts created by the State Board will be approved if the State legislature passes, and the Governor signs, certain types of policing legislation specified by the District Court before June 9, 1981.[29] That legislation was passed by the legislature and signed by the Governor on May 14, 1981.[30] The legislation is now before the District Court for its approval.

The four-district reorganization plan currently before the District Court, and approved by it subject to the passage and signing of the specified policing legislation, is not dissimilar from the reorganization plan which was adopted by the State Board in early 1978 and which the same District Court then struck down on the grounds that it came too late and would interfere with the Court's desegregation remedial process.

This, then, is the highlighted history of the almost constant intrusion by the Federal Courts into the educational systems of the State of Delaware since the early or middle 1950's right up to the current day.

Among other fall-out effects of the resulting continuing uncertainty about the type, nature and extent of the public school system which would ultimately result in New Castle County, and the disruption which is part and parcel of such uncertainty, has been a rush away from the New Castle County public school system. When the first lengthy desegregation trial was held, with its attendant publicity, in September 1973, the total student population in the desegregation area was 83,800, of which 66,900 were white. When the most recent trial on the constitutionality of the 1980 four-district reorganization adopted by the State Board, was held in September 1980, just seven years later, the total student population in the desegregation area was 55,981, of which 38,981 was white. This means that there has been a loss of about 27,920 white students in the desegregation area in that seven year period of school uncertainty, disruption and turmoil, or a drop of 41 % below the 1973 white student population, while the black student population has remained almost static in terms of absolute numbers. In the same seven year period, the best census figures available indicate that the overall general population in New Castle County has also remained just about constant in terms of absolute numbers.[31]

The figures show an obvious increase in the rate of white school age flight out of New Castle County. There are now newspaper reports of studies by the school authorities and respected interested organizations showing that within the next few years the demographic changes in New Castle County will result in at least one of the suburban areas becoming segregated with black students with a resulting need of an entire new scheme of pupil assignment throughout the county. No one can predict what massive increases in mandatory busing will result if that scenario becomes reality.

But the cost in loss of students, in uncertainty and disruption, all of which costs those students who remain in the New Castle County schools by, among other things, depriving them of the benefits of the presence of their brother and sister students with the resulting broader base for educating, planning, dialogue and economical utilization of all public school facilities which would exist if the fleeing students had remained, is only part of the story.

There is about to take place a large scale closing of school buildings -- the shrunken student population cannot support the facilities. This also will have an impact on the extent of busing, and no one yet knows just what impact.

The cost in terms of real dollars which could have been spent for programs, teachers and other directly-effective educational up-grading if they had not been diverted to the cost of busing, litigation, and the other fall-out effects of the mandatory busing remedy, is enormous. One wonders how much the "quality" of education for all students in New Castle County could have been enhanced if those real dollars could have been spent on programs and teachers and the like.

1 Evans v. Buchanan, et al., 416 F.Supp. 328, 365 (D. Del. 1976).

2 Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L.Ed. 873 (1954).

3 Evans v. Buchanan, et al., 416 F.Supp. 328, 365 (D. Del. 1976).

4 Id.

5 Tied in with a massive (for the State of Delaware) single school district created by the Court out of the geographic area previously made up of eleven school districts. The Federal Courts have consistently paid "lip service" to the Delaware history and tradition of small, neighborhood school districts designed to increase the quality of public school education by facilitating (i) the input of parents into the school system and its operation and (ii) the ability of the school authorities, administrators and teachers to communicate with parents and students and maintain a running dialogue with them on all school matters. Regardless of that "lip service", however, the Federal Courts converted eleven school districts into one school district with a Board of Education of 5 persons [replacing at least 55 Board members (most of which had been elected) on the previous eleven district boards] appointed by order of the Court from certain specified geographic areas to hold office for five years (with elected successors to replace them one by one over that period) and to govern the educative function for some 72,000 public school students.

6 A part of the Smyrna public school district was in New Castle County, and the other part was in Kent County. The New Castle County part of the Smyrna district and all of Appoquinimink public school district (located along the Kent County border with New Castle County) are not involved at all in the New Castle County public school desegregation case.

7 Gebhart v. Belton, Del. Supr., 33 Del. 144, 91 A.2d 137 (1952).

8 347 U.S. 483, 74 S. Ct. 686, 98 L.Ed. 873 (1954) ("Brown I"); 349 U.S. 294, 75 S. Ct. 753, 99 L.Ed. 1083 (1955) ("Brown II").

9 Steiner v. Simmons, Del. Supr., 35 Del. Ch. 83, 111 A.2d 574, 581, 582 (1955).

10 Evans v. Buchanan, 195 F.Supp. 321-322-323 (D. Del. 1961).

11 Known as "The Educational Advancement Act." 14 Del. C. § 1001.

[12] *Evans v. Buchanan*, 393 F.Supp. 428, 439 (D. Del. 1975).

[13] *Evans v. Buchanan*, 379 F.Supp. 1218, 1220 (D. Del. 1974).

[14] *Id*. at 1224. One of the three judges dissented from the ruling of the other two that it was premature (i) to consider the constitutionality of the 1968 State Act and (ii) to decide whether the remedy must look beyond the boundaries of the City of Wilmington. He was of the opinion that the Act was unconstitutional and that an inter-district remedy was required.

[15] *Evans v. Buchanan*, 393 F.Supp. 428 (D. Del. 1975).

[16] *Buchanan v. Evans*, 423 U.S. 963, 96 S. Ct. 381, 46 L.Ed.2d 293 (1975).

[17] *Evans v. Buchanan*, 416 F.Supp. 328, 361 (D. Del. 1976).

[18] *Id*. at 350.

[19] There were many more empty seats in the ten suburban districts than there were students in Wilmington.

[20] *Evans v. Buchanan*, 555 F.2d 373 (3d Cir. 1977).

[21] *Buchanan v. Evans*, 434 U.S. 880, 98 S. Ct. 235, 54 L.Ed.2d 160 (1977).

[22] *Evans v. Buchanan*, 447 F.Supp. 982 (D. Del. 1978).

[23] 61 Del. Laws Chapter 210; 14 *Del*. *C*. §§ 1001, *et seq*. (1978 Law Supp.).

[24] *Evans v. Buchanan*, 447 F.Supp. 1041 (D. Del. 1978).

[25] 582 F.2d 750 (3d Cir. 1978).

[26] ___ U.S. ___, 100 S. Ct. 1862, 64 L.Ed.2d 278 (1980).

[27] 62 Del. Laws Chapter 351, signed by the Governor on July 8, 1980.

[28] *Opinion of the Justices*, Del. Supr., 425 A.2d 604 (1980).

[29] *Evans v. Buchanan*, Civil Actions No. 1816-1822, Opinion and Order dated April 10, 1981.

[30] House Bill No. 214.

[31] The figures indicate that in July 1973 the New Castle County population was 398,400 and in April 1980 it was 399,002.

Senator **Biden**. The chairman also indicated he would like to leave the record open for questions that may come to mind as Senators review your statement.

Just so that you know the mechanics of this—this is a subcommittee, of which I am not a member, but I am the ranking member of the full committee—when this subcommittee makes its recommendation, it will come to the full committee, and it may very well be at that time that you will find a renewed interest in some of the things you said and inquiries may come from individuals who have not focused on it yet.

I thank you for coming down.

Mr. **Arnold**. Thank you.

I would like to make one more comment I meant to make earlier.

Senator **Biden**. Surely.

Mr. **Arnold**. We spoke about no violence in the Wilmington schools. I would have to back up what Bill D'Onofrio said—that the PAC organization, I believe, has to take a large share of the credit for no violence. They preached no violence from the very beginning. I was involved with them, and I have to back that up. Jim Venema was president of it, and he is here with me today. I believe that no violence was caused, basically, because of their demanding that their members would not participate in any violence.

Thank you.

Senator **Biden**. Thank you very much, Senator.

Our next and final witness is a very distinguished professor, Prof. Gary Orfield, professor of political science of the University of Illinois. He is one of the Nation's most respected authorities on the subject of school busing and has published widely on this topic. He has served as an expert witness in a number of important school busing cases throughout the Nation, including most recently the St. Louis desegregation suit.

Welcome, Professor, back to the Senate. Welcome to this subcommittee. I am anxious to hear what you have to say.

STATEMENT OF GARY ORFIELD, PROFESSOR OF POLITICAL SCIENCE, UNIVERSITY OF ILLINOIS

Mr. **Orfield**. Thank you very much for the opportunity to appear before the subcommittee.

CONGRESS AND ANTIBUSING AMENDMENTS

For the last 15 years, I have been following the school desegregation struggles in the Congress, both in the House and the Senate. Every year during that period, there has been an antibusing amendment, or several, which has passed at least one House of Congress.

Every year, I have found hearings that have been set up to reflect the viewpoints of neighborhood school organizations, such as NANS, which is here today. Every year, people have been led to expect around the country that Congress is going to solve this problem.

None of these pieces of legislation has solved the problem. None of them has stopped the courts from ordering school desegregation. What they have done is isolate the courts, deny them needed assistance, limit the range of remedies, force the courts to impose more drastic solutions, and cut out the support system for the educators who are supposed to comply with the Constitution.

I believe that Congress does have a positive role to play in this area, and that it ought to play it, and that it would greatly ease and improve the situation with compliance with school desegregation orders.

Assuming my statement is going to appear in the record, I do not have to read it.

Senator BIDEN. Are you going to tell us what some of those things that Congress has passed are?

Mr. ORFIELD. Yes—absolutely.

Senator BIDEN. Good. I am anxious to hear them.

Mr. ORFIELD. I will just highlight this statement.

Senator BIDEN. OK, take your time, because you are good. I am anxious to hear all of what you have to say. You take as much time as you want. I did not want to go to the budget hearing anyway.

Mr. ORFIELD. I know budget hearings are depressing this year, Senator.

Senator BIDEN. They certainly are, especially now that we are talking about productivity and deficits. We have a new school.

You know, things change up here very rapidly, Professor. I was told for 5 years that deficits meant inflation. Now, I am told deficits increase supply-side incentives. So I am anxious to stay here.

FAILURE TO SUPPORT INTEGRATION

Mr. ORFIELD. I believe that not since 1968, when Congress passed the Federal Fair Housing Act, has there been any significant congressional effort to deal with the underlying reality of our urban centers, which is steadily spreading racial segregation.

The Kerner Commission prophecy that we are going to become separate and unequal societies is coming true, and in our public education systems it is coming true even more rapidly. Many of our school districts are not only segregated by race but even middle-class blacks and Hispanics are entering separate, segregated suburban districts.

FALSE PREMISES OF LEGISLATION

I believe that once again Congress is moving toward antibusing legislation which is based on false assumptions. One of my fields of research is Congress. I read the Congressional Record every day and I find speech after speech about this issue. All these speeches seem to have certain basic assumptions in them—at least several of these appear in most speeches.

One is that integration can be achieved without busing—that the courts have gone crazy, that there is something else that could be done that is easier, and that somehow we have got some mad sociological theorists sitting in judicial robes imposing their unnecessary solutions, and that there is something else that could be done that was really popular.

A second assumption is that blacks oppose busing as well as whites. We heard testimony on this this morning. I would like to speak about this.

A third one is that education has been damaged by court-ordered desegregation plans. This, again, we heard a good deal of testimony on this morning, and it appears in almost all the statements that call for imposing limitations on the courts.

A fourth one is that minority students have not been helped by desegregation plans using busing.

A fifth one is that busing itself—transportation of students—has a negative effect on education.

A sixth is that court-ordered desegregation cannot work because of white flight. We heard a great deal of testimony on this, again this morning.

The last is that there is some other way that the money that is spent on busing could solve the problem of educational equality—what I call the return to the "separate but equal" notion.

ROLE OF THE COURTS

In my experience—and I have worked in a number of courts and spoken with a good many judges—most of the judges that sit in the Federal courts in this country are conservative people; they are people who have been part of the local legal establishment; they have served in Congress; they have served in legislatures; they have been active in politics; they are members of country clubs; they are not radicals in any sense of the word.

Almost always when you talk to judges who have been through these cases, when they start these cases they are skeptical; they are inclined to hold for the school board.

What they see is month after month of evidence of violations. What they find is total recalcitrance on the part of the responsible school authorities and elected officials in doing anything to solve the problem of legally-imposed segregation in schools and housing.

What they find is that nobody else will do anything, and the buck stops where they sit. Even former Congressmen who vote for antibusing legislation, when they get in the Federal court, find that they have a constitutional duty and that nobody else will do anything, in part because of all these amendments that are floating around Congress and State legislatures every year. They make it almost impossible for the educators who want to do something to do anything.

Educators are called soft on busing. People in their communities are told that they are not going to have to do anything. The result is that all of the other support systems are cut out, the buck is passed to the court. The court is left as the only institution in the society that addresses the issue of a long history of imposed segregation in our urban areas, and steadily spreading segregation that I think imperils our urban life.

This is not a healthy situation, and we ought to have some leadership from the legislative side in dealing with these terribly important, decisive issues.

THE CHANGING NATURE OF URBAN AMERICA

Some parts of our country are now becoming extremely multiethnic. Los Angeles is now predominantly minority. The whole county of Los Angeles is almost half minority. Some parts of our country are going to become true multiethnic societies.

If we go on with segregation spreading, with inequality built into that segregation, with race increasingly defining municipal boundary lines, and with racial and class segregation piled on top of one another, we face extraordinarily serious problems about the stability of the future of our society.

Senator BIDEN. Professor, do you mind if I interrupt you as you go along?

Mr. ORFIELD. No; go right ahead.

Senator BIDEN. You are the last witness, and you have all the time you want.

I have heard cited studies indicating that up to five States in America by the year 2000, if population trends continue, will be either absolutely majority Spanish-speaking or approaching more than 50 percent of the population being Spanish-speaking as their first language. Is that correct, or do you know that?

Mr. ORFIELD. No; I am quite sure that is not correct, Senator. California and Texas, I believe, have the largest Hispanic populations.

What we are seeing, in the State of California for example, is a majority of non-Anglos in public schools in the relatively near future.

Senator BIDEN. But it is not total population?

Mr. ORFIELD. No—not total population—and it is not all Hispanics. That includes Hispanics, blacks, and Asians who are increasing very, very rapidly—even more rapidly than Hispanics in percentage terms.

Senator BIDEN. Thank you.

Mr. ORFIELD. But these populations are increasing very fast, and they are segregated, and they are being segregated by residence as well as language increasingly.

BUSING AND RESIDENTIAL SEGREGATION

The courts order busing and the judges order it because it is the only practical way they can integrate schools, given the extraordinary residential segregation we have in our metropolitan areas.

Most of our major metropolitan areas have such high levels of residential segregation that 80 to 90 percent of the black families would have to move to achieve a nonracial pattern of residence.

We do not have any evidence that that residential segregation is attenuating. In fact, between 1960 and 1970, on a metropolitan level, residential segregation in the United States increased. We are just beginning to see statistics from the 1980 census. Nothing suggests a significant improvement in residential segregation.

We are seeing more and more suburban areas become ghettoes or barrios, and they are going through the same kinds of racial transitions that we have seen in the central cities.

SEGREGATION AS A BIG CITY PROBLEM

We have solved the problem of school desegregation in quite a few sectors of the society, and the remaining problem is concentrated in big cities.

Since 1970, the South has been the most desegregated part of the United States and has been the area where attitudes toward school desegregation have improved the most. Some southern States have virtually no segregation left. Most of Florida, for example, has complete desegregation and has had it for almost 10 years.

Most of our small cities in the United States have desegregated, usually using modest busing and some incentive programs like magnet schools. My own town of Champaign in central Illinois has 13 years of a busing plan. They just revised it. It has been peacefully accepted, and it has been very successful.

If you look at the United States when you start at Chicago and go to the west coast, there is no significant school segregation remaining in that sector of the country. Most of New England has substantially eliminated school segregation.

The problems that remain are problems of our largest cities, and those cities are tremendously important for black and Hispanic children in public schools.

The problem that we have is that about half of the black students in the country and about 60 percent of the Hispanic students go to school in 50 school districts, and those are school districts that are afflicted, not only with segregation, but many of them are afflicted with financial declines, tax base declines, and a multiple set of terrifically difficult problems. These districts serve a small fraction of white children.

We see evidence of increasing segregation in many of these central city school districts. Although there has been tremendous progress in the smaller school districts, there has been regress in many of these cities and we see evidence of increasing Hispanic segregation that looks a lot like the black segregation of the last generation.

In cities like Houston and Chicago, for example, Hispanic high school students a decade ago were in predominantly English schools, and now they are in increasingly segregated Hispanic schools.

FAILURE OF VOLUNTARY APPROACHES

There is no evidence that these problems will go away spontaneously, there is no evidence that desegregation can be accomplished without reassigning students, and there is no evidence that it can be done in the big cities on a voluntary basis.

Some small districts have achieved desegregation in a completely voluntary way with magnet schools and other things—districts that have one or two segregated schools and have good leadership. Some of them did it in the midsixties, and it has worked fine. Some of those districts are showing enough residential desegregation now so that they can substantially cut down on the busing that they have had for the last generation.

In the big cities, though, there is no big city that has achieved full desegregation through voluntary means. The closest approach to this has been in Milwaukee where there has been a massive, imaginative magnet school program.

The only national study of magnet schools shows that they do not work as a remedy left unto themselves. They do work as a useful component inside of a mandatory framework. In that kind of situation, they can draw very effectively.

FAILURE OF REZONING ATTENDANCE DISTRICTS

Redrawing of attendance boundaries rather than transporting students can be a very counterproductive remedy in big cities. If you just extend the boundary across a ghetto boundary line to encompass a few blocks of a white area and you isolate the rest of the metropolitan area from that remedy, what you do is create a dual housing market. Some people are going to have integrated schools, and all the rest are going to have all-white schools. We have a great deal of evidence of steering toward the all-white schools in that kind of situation.

Senator BIDEN. Of what toward those schools?

Mr. ORFIELD. Steering.

Senator BIDEN. Steering?

Mr. ORFIELD. Yes—steering the residential market. A study of 14 metropolitan areas found that whenever a school was mentioned in a real estate ad, it was almost always an all-white school. Whenever a school district was mentioned, the same thing was true.

So when you isolate some limited areas of integration and exclude others, you affect the movement and settlement of people.

BLACK ATTITUDES ON BUSING

Virtually every speech that I read says that blacks oppose busing. It is true that there are blacks who oppose busing. You heard one this morning. The black community is a complex community just like any other large sector of our population. And it is true that whites oppose busing by great margins.

The February 1981 Gallup poll showed that 78 percent of whites opposed busing for better racial balance—that is the way the question was asked. But they also went on to ask blacks, and in that survey, which I think is the most recent national survey on this, only 30 percent of blacks opposed busing. By a 2-to-1 margin, blacks supported busing.

A number of studies of black opinion within individual communities that have desegregation plans show in a large majority of cases that there is substantial black approval of the plan, not because blacks believe that blacks are inferior, as your witness suggested, but because blacks believe that whites treat white schools better than black schools and that they believe their kids get a better education.

In St. Louis this year, we had a part of a court order that offered students the opportunity—black students who are being transported very long distances on a one-way busing plan—the opportunity to opt out of that plan. It was offered to almost 800 students. Less than 15 opted out, even though it was a very long distance and the plan was one way.

We find in Los Angeles, with the dismantling of the plan, many thousands of black students continue to take very long bus rides to get access to what they perceive to be better quality schools that are located and operated in white neighborhoods.

Hispanics in Los Angeles face some 200 schools that are overcrowded, with no significant action on that problem. Students are forced to attend school in shifts, year 'round. It is not surprising that many families believe that whites are treated better.

THE RATIONALE OF THE "BROWN" DECISION

That was the basic understanding of the Supreme Court in *Brown* v. *Board of Education*—not that blacks were inferior, but that this is a predominantly white society, a society with a long history of discrimination, that white society treats white institutions better in terms of input and in terms of expectations and in terms of connections with opportunity structure after school.

INTEGRATION AND BLACK STAFF

Senator BIDEN. I do not doubt what you are saying, but how does that comport with the assertion that is usually made when a desegregation order takes place, that we also have to start balancing teachers?

In other words, my experience in speaking with black leaders and people across the country is not dissimilar from what you just said—that given the option, they would keep their child on a bus to send them out to an all-white school, with all-white teachers, with an all-white administration.

There are two movements that are moving. One is: Let us talk street talk—you know, talk the language of the ethnic environment from which someone comes and have a different mixture: "We have black principals, black teachers, black administrators." Yet, given the option, black parents seem to be opting out of a school that is not only black in terms of the enrollment, but black in terms of administration and teachers for white schools with white administrators and white teachers.

Am I right about that? And what does that mean, if I am?

Mr. ORFIELD. I do not know. I have never met a black parent and I have never seen any research evidence to suggest that black parents do not prefer to have some black teachers and administrators in the schools to which they send their children.

Senator BIDEN. I am not trying to trap you. I am not making absolute arguments. But in the speeches that you have ever read that I have put in the Congressional Record, you have never seen me list these seven items.

One of the things you do not see me list is the argument that as many black folks oppose busing as white folks, because I do not find that. I find that those in the system become disenchanted with it rapidly, but I would not say that the same percentage of black people oppose as white people.

You came up with an interesting point. You said that 800 black students were being bused—I assume you were talking about Los Angeles?

Mr. **Orfield**. No—St. Louis. There are many thousands in Los Angeles.

Senator **Biden**. You said 800 were being bused long distances, and given the option to opt out of that long busing pattern, only 15 chose.

Mr. **Orfield**. I think it was fewer than 15.

Senator **Biden**. Fewer than 15? Why? Why did they choose to stay in there?

Mr. **Orfield**. I think that they believed that those schools were giving superior educational opportunities. By the way, those schools all had fully desegregated faculties that were over half black.

Senator **Biden**. They all were?

Mr. **Orfield**. Yes. Every school in St. Louis is, under the court order. And most school districts are either under a court order or a Federal Office of Civil Rights requirement now.

Senator **Biden**. You have answered my question—the schools to which they are being bused have faculties of the same composition as the schools they would have gone to?

Mr. **Orfield**. That is right.

All of us who work in desegregation research find desegregation of the faculty is an absolutely vital element of a successful school desegregation plan. We have pretty good evidence to show that kids behave better when there are role models and people from both adult groups present in the school and that both groups perceive the school to be operating more fairly.

Senator **Biden**. You have just answered my question. Thank you.

WHITE ATTITUDES ON BUSING

Mr. **Orfield**. Whites, of course, oppose busing by large majorities. Part of the reason, I think, is that they believe certain things that are false.

COSTS

They believed, for example, in a survey that I did a number of years ago, that the busing cost 10 times as much or more than it actually cost. Most whites in the country and a great many blacks believe it costs 25 percent or more of the school budget.

The last time the Senate investigated this, they found in most of the major busing orders in the South, which were the only ones that were in place at that time, the typical cost of busing itself was 1 or 2 percent of the school budget. This was the finding of the Senate Select Committee on Equal Educational Opportunity.

A great deal of the money you find quoted in testimony as the cost of busing is not going into busing, it is going into improving education at the time that the plan is implemented through magnet schools, new curriculae, and all kinds of proposals.

Senator **Biden**. When you say busing, do you mean physically just the bus?

Mr. **Orfield**. Physically busing—yes. Most of these orders now, since the *Milliken II* decision, include many educational components. They increase teachers and require concentration on basic skills, magnet programs, and so on. That is not busing, that is education.

Senator **Biden**. OK. But do you not think that when you ask the people if busing costs more, do they not assume that it is more than the bus?

Mr. **Orfield**. Most people who raise these things say it is for the bus and the gas, and they say we have got a gas shortage, and so forth.

Senator **Biden**. OK.

Mr. **Orfield**. In Los Angeles, for example, the order there brought the school district over $100 million additional in resources from the State government each year. Even though the city school board fought for the end of the mandatory busing requirement, they wanted to keep that money for their educational programs, for cutting down class sizes, for special programs in impacted areas, and so forth. That should not be counted as a busing cost, that is an educational cost that is coming because there was a constitutional violation by the local and the State government.

FEAR OF UPHEAVAL

In terms of upheaval, in many of these talks—and I do not know whether this includes yours, Senator—we hear that communities go into uproar at the time these plans are implemented. That is another myth. Most communities implement these plans without any physical uproar of any sort.

Last fall, I rode down on the first bus into what was considered the area where difficulty was most likely in St. Louis, and there was the football team from the white school out to greet the black kids coming down on the bus.

There was a cameraman from one of the networks there—about 50 of them as a matter of fact—and he said: "I'll never get this on the news. I'm leaving for Los Angeles."

That is a more typical first day of a school desegregation plan. Very few produce a great deal of uproar. Most of them are implemented peacefully. Once the order is entered, people realize it is better to do it in an orderly fashion—though they may not like it—than to divide their community.

I'd like to say that I think the neighborhood school association follows that principle as well. They do not try to create uproar, and most communities do not have it.

Senator **Biden**. Again, that is not because they like it.

Mr. **Orfield**. That is not because they like it, but it is not true that there is a great deal of uproar in most communities. That is not a sign that people love this remedy, but it is a sign that it is implemented peacefully and in an orderly fashion in a great majority of cases around the country.

Senator **Biden**. What do you mean by "uproar"? Do you mean uproar in terms of physical——

Mr. **Orfield**. I mean physical uproar.

Senator **Biden**. OK. I guarantee you, there is a lot of uproar and it is a nonphysical uproar.

Mr. **Orfield**. I know that. Of course, there is a great deal of community opposition, in the white areas particularly.

BUSING AND EDUCATION

Busing is often attacked as a threat to good education. We have heard a lot of testimony on this this morning.

When the Harris survey did a study in 1978, they found that 85 percent of whites said that they opposed busing, and then they asked people: "Was your child actually bused under a desegregation order?" and they found out which white families were actually bused, and they said: "Well, how is it working out?" Of those white families 56 percent said their experience was very satisfactory.

The researchers concluded that the irony of busing to achieve racial balance is that rarely has there been a case where so many have been opposed to an idea which appears not to work badly at all when put into practice.

Senator **Biden**. That was in 1978?

Mr. **Orfield**. Yes.

EVIDENCE NEEDED BY THE COMMITTEE

Senator **Biden**. I am not being facetious, but I really would invite you to do a study on New Castle County, Del., which is a fairly upwardly mobile, affluent community. As others point out, it is like the microcosm case study. I would really invite you to come in and do one. We would bet part of our wages on the outcome of that one.

Mr. **Orfield**. I would suggest that the subcommittee call a couple of people who have already done big studies on New Castle County, Del.

I know there was a book published by a Professor Raffell whose polls have been quoted here very frequently this morning. He ought to be called and asked to testify.

There was a large study by Dean Robert Green of Michigan State University of what has happened in New Castle County, Del. He ought to be asked to testify, and so ought the school superintendent.

Senator **Biden**. What year was Green's study?

Mr. **Orfield**. I think it is still going on. I know it was going on last year.

I think it would be a good rule, if this subcommittee is going to make a credible record for the courts and so forth, to call the school superintendents and the researchers who have had major research projects in each city that is affected by these things.

I would hope, for example, in regard to St. Louis that Superintendent Robert Wentz of the St. Louis public schools and the school board chairman be called in and some of the researchers who have looked at it there, as well as the neighborhood school people and the State legislators, so that all sides could be fully aired.

IMPACT ON SCHOOL ACHIEVEMENT

In terms of educational achievement, we are getting some pretty interesting and positive results recently. You probably are familiar with the recent national assessment of educational progress. One of the most encouraging things that that assessment showed was that the largest gains in achievement in the country are now being made by southern black students—something that I think all of us would have hoped for.

The southern black students have been the most integrated black students in the country now for 10 years. They have been leading gainers in two successive national assessments. They have been the leading gainers in educational achievement among the major groups in the country, and I think that is a very encouraging sign, both for integration and for programs like title I, which is so threatened today.

The most thorough review of all the studies of educational achievement in desegregated schools was done by Robert Crain of Johns Hopkins and Rita Mahard of the University of Michigan for the National Review Panel on School Desegregation Research.

Senator BIDEN. What year was that study?

Mr. ORFIELD. I believe that was done in 1979, Senator. They looked at scores of studies.

They found that, if you took out from all of the studies that have been done, those who looked at students who were desegregated in first grade—there were substantial gains for the black students who began desegregation in the first grade and continued throughout. The results were much smaller for children who began later. I would not say that it solved the whole problem of educational equality.

It seemed like the crucial thing was beginning at the beginning of the school career and continuing. Then desegregation did indeed have a substantial positive effect.

There is some confirmation of this from Louisville where, as you know, there was a very, very stormy beginning of the desegregation plan in 1975. The school district now reports that there have been substantial gains for all of the classes of black students who began school since the desegregation plan was implemented. In the first five grades in the Louisville school system, the black students are showing substantial gains.

The Louisville newspaper took note of that and ran a very positive editorial about what was happening there. I would be glad to supply that for the record, if you wish.

Senator BIDEN. What does it say about the white students?

Mr. ORFIELD. It showed that white students were making small gains and the black students were making substantial gains.

Senator BIDEN. But the white students were making gains over the same group before busing?

Mr. ORFIELD. Yes.

Senator BIDEN. Without objection, it will be included in the record at this point.

[The material supplied follows:]

[From the Louisville Times, Tuesday, May 13, 1980]

HUMAN, EDUCATIONAL GAINS CAME WITH DESEGREGATION

Delving into educational reports very often produces nothing more than a mild headache. As scholar Gary Orfield said in a recent Brookings Institution report, "Evaluation research is still in a primitive phase and seldom reports significant results from any educational program."

Whenever it does, one or two other studies usually contradict the original findings. So it isn't safe to say that the dramatic progress made by black elementary school pupils during the first five years of Jefferson County's desegregation plan is simply the result of desegregated learning. I most other desegregated systems; test scores, either for blacks or whites, appear to have improved only moderately, or not at all.

By contrast, the report on achievement test scores issued last week by the Jefferson County school system shows some striking accomplishments. Black students, particularly older ones, continue to lag behind whites in performance on standardized tests of academic achievement. But the gap is fast narrowing. As Assistant Superintendent Frank Rapley observed, "The more years there has been desegregation in the system, the more improvement there has been in the scores."

A BIG LEAP BY FIRST-GRADERS

The beginning was dismal. For the first year, black children scored well below the national norm in every grade, and as much as 32 notches below their white counterparts in some grades. It's hard to escape the conclusion that they were getting inferior education.

There has been significant improvement every year since. Last year, for instance, black first-graders averaged at the 49th percentile in reading, meaning they were one-point below the national average for all students. Five years ago, by contrast, black first-graders were at only the 30th percentile. The biggest improvements have been by children who have obtained most or all of their education in the desegregated system. Scores for the first five grades are much improved, those at the junior high level have improved a little, and at the senior high school level, matters have improved not at all.

The failure to improve in the upper grades is, of course, disappointing. But common sense and educational theory agree that learning patterns are established in the early grades. Not much progress is to be expected where students are attempting to do high school work without the necessary background in the basics. Perhaps, with a strong remedial program, there would have been a similar improvement in high school performance.

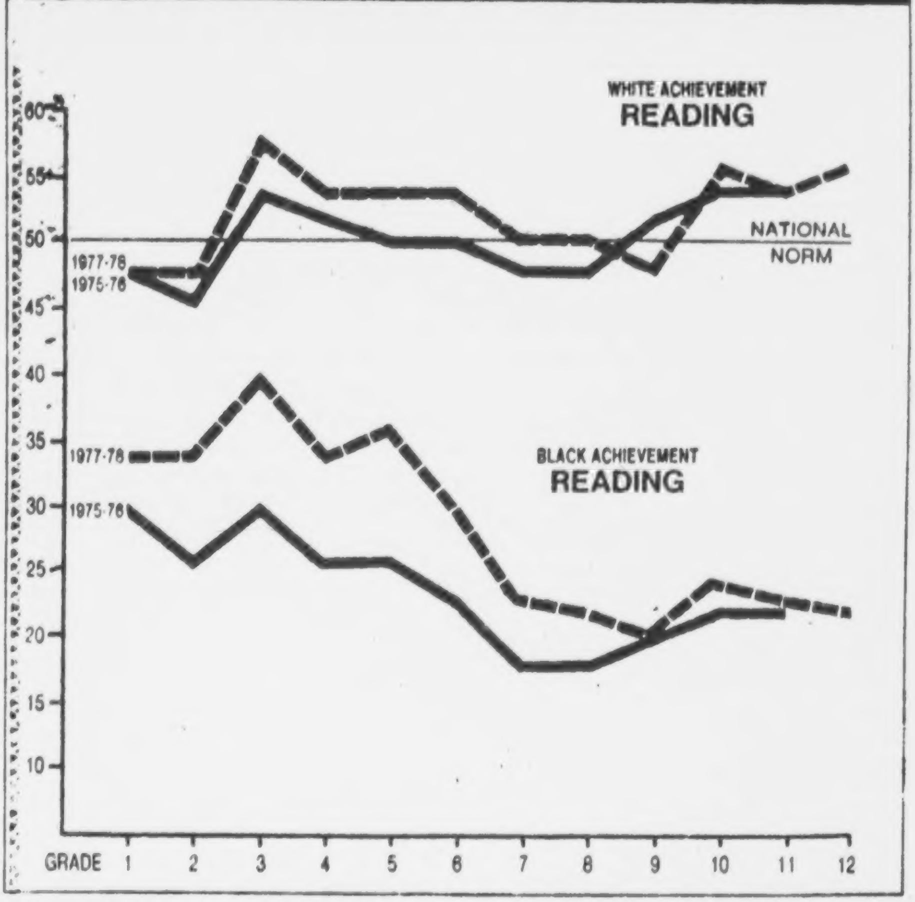
LESS TURMOIL, MORE TOLERANCE

But at any rate, the gains have been more substantial than anyone had reason to expect. And they have been achieved at no cost to the performance of white students. White children were scoring at or around the national norm before desegregation, and have improved a few percentage points since.

Meanwhile, as a series of *Louisville Times* articles examining the five-year experience with desegregation shows, the initial turmoil of busing is long past, and many children, if not their elders, are discarding the old racial stereotypes. The gains in human relations have been as impressive as those in academics.

Problems remain—so many, in fact, that the evidence of improvement is often obscured. Public education in Jefferson County, as almost everyplace else, is a long way from the ideal. But there's convincing evidence that it's a lot closer than it was five years ago.

HOW READING SCORES COMPARE



This graph shows the reading achievement scores for black and white students in each grade in 1975-76 and 1977-78 — the most recent year comparable figures are available. The scores are percentages that show what proportion of children in a national sample would have done better or worse than local children in each grade. The score of 50 is the national norm, which means half the nation's children would do better and half worse. The math scores of local students follow the same trend as the reading scores.

Mr. **Orfield**. In Denver, which is the first northern city that was ordered to implement a citywide desegregation plan, all grades exceed national norms in all subjects, even though the district is three-fifths minority, and there have been substantial gains from the achievement score levels that the district recorded before desegregation.

I would not be in a position to argue that desegregation is an educational panacea, it is not. Desegregation is a major reorganization of a school district to try to eliminate unconstitutional segregation.

If it is properly implemented, however, and if students are put in desegregated schools at the beginning of their careers, I believe there can be significant gains to the minority children. If there is strong educational leadership that is brought into the design of the plan and educational reforms are implemented at the same time as busing, I believe there can also be gains for the white students.

In any case, there is no significant evidence that any of the scholars who participate in this controversy around the country can cite you that white students are hurt by desegregation.

Professor Armor, who was here testifying for the opposite point of view at your last hearings, has said white students are not hurt, I have said it, and almost all of the researchers in this field say that the effect on white students is negligible unless there is a major educational reform at the same time of the plan, and then sometimes it is positive.

Senator **Biden**. Sometimes it is what?

Mr. **Orfield**. Sometimes it is positive, as it has been with small gains in Louisville, some gains in Denver, and so forth.

THE WHITE FLIGHT CLAIMS

On the white flight issue, of course, since Professor Coleman's paper in 1975, we have had scores of studies of white flight and the effect of school desegregation orders. Many have argued that the courts are engaged in a self-destructive policy and that there is no possibility that desegregation can take place because of white flight.

I think that, although this research started out with stormy disagreements, there is now a good deal of consensus about some of the major points. One of them is that desegregation is most difficult and least stable in big cities with large minority populations that are surrounded by white suburban districts that are untouched by the desegregation plan. That is commonsense, and it is true.

This is particularly true in the first year of a desegregation plan. Usually, there is an initial loss that is substantially greater than normal the first year of a plan when a plan is limited to a central city. When a plan consolidates previously independent districts, that might happen also in the first year.

Most of the losses are from children that do not try the desegregated schools. After we once get kids in desegregated schools, the loss rate tends to go toward the demographic pattern before the desegregation plan was ever implemented.

One thing we find in a great deal of testimony and writing in this area is a mixture of demographic declines and declines that might result from white flight from a school plan. In other words, a normal city is now declining substantially in white enrollment each year whether or not there is any desegregation plan. That normal decline is often reported as part of white flight when desegregation begins.

For the last 3 years, for example, Chicago, which is the most segregated city in the country and has never had a busing plan, has been experiencing more than a 10-percent loss of its white students each year. That is the normal demographic pattern there now. It is not related to any desegregation plan.

Senator **Biden**. I apologize for making this portion of the hearing, at least, so parochial, talking about Delaware. The issue, in a sense, is over in Delaware. We have had the decision, it is in place, and there is nothing pending other than legislation that affects all the country.

With regard to the white flight question and the assertion you have made, you cited Chicago where there has not been an order but there has been a significant decline and the white flight is a fact there. That is essentially reflective of what the normal decline would have been. The normal decline is cited as white flight.

Mr. **Orfield**. Yes.

Senator **Biden**. In a report prepared by R. H. McBride called "Summary Demographic Trends of New Castle County's School Districts 1971-83," let me just give you some of the following estimates that he gave. I am not sure whether that is one of the ones you cited we should get.

Mr. **Orfield**. I would be glad to look at it, Senator.

Senator **Biden**. Without objection, it will be included in the record at this point.

[Mr. Orfield's subsequent response to Senator Biden's question follows:]

You will note in examining the graph in Mr. McBride's study that the general pattern of enrollment change in the district is a long-term one that began well before the desegragation order and continued after it. There is no sharp leap associated with the implementation of the order. Some would say that the long-term trend itself shows what David Armor has called "anticipatory white flight." Doubtless some people opposed to desegregation may transfer to private schools at the very beginning of a long desegregation battle but there is also considerable evidence that many people do not believe it will ever happen (because of the statements of anti-busing politicians) until the day the final appeal is denied and the reassignment notices sent. I think that what we are looking at is primarily a long term demographic trend, not white flight.

When I was in New Castle County in 1980 I obtained the figures on private school enrollment. The school district had much more comprehensive data than I have seen elsewhere. These figures should very clearly show white flight since there is considerable evidence that most flight that does occur is to non-public schools, not to other jurisdictions. The figures showed that in the city of Wilmington enrollment in Catholic parish schools fell 302 from 1974–1979 while the suburban parish schools gained 312. For all of New Castle County, in other words, the parish schools, with an enrollment of over 11,000 gained 110 students during the busing crisis. The private Catholic schools had a bigger gain, 500 students. The great bulk of the new enrollment came in independent schools, which gained 3,756. Some of these students doubtless entered new schools created explicitly for those opposing desegregation, much like the "segregation academies" of the South. (It should be noted, however, that "Christian academies" are now growing across the country, even where there are no desegregation orders, in part because of the revival of religious fundamentalism the country is experiencing.)

Unquestionably there were some students lost to the New Castle schools at the beginning of the desegregation process. The underlying demographic changes, however, appear to be far more important. Like most other older metropolitan areas, metro Wilmington is doubtless experiencing differential birth rates of minority and white families, relative aging of white population, not outmigration of whites from the metropolitan area, particularly to the Sunbelt, and the consolidation of enrollment in Catholic schools (a national phenomenon) after a long period of decline. My prediction would be that any future changes in the metropolitan area would be purely demographic and that the central city and inner suburbs will have much better luck in holding white students in public school than would have been true without the court order. The following article shows that there is already a small trend of return from some private schools.

[From the News Journal, Mar. 9, 1980]

SOME PUPILS WHO FLED RETURN TO PUBLIC SCHOOL

(By Steve Goldberg)

More than 9 percent of the students who left the New Castle County School District to go to private schools have returned according to data compiled by the district's research office.

John G. Parres, the director of research, said, however, that he doesn't know whether the rate of return represents a trend or not.

"We've got 9 percent of the kids coming back," Parres said. "What's causing that to happen is speculative."

Since the district was formed on July 1, 1978, 5,400 students have left to attend private schools, Parres said. By the end of January, 491 of those students had returned to the public schools.

Parres said he isn't sure how many left the district because of "white flight"—the tendency of whites to flee newly desegregated school systems—or how much of the return has to do with restored confidence in the public schools.

The number of students leaving for private schools outstrips the increase in enrollment of students in Delaware private schools, suggesting that many are attending schools in other states.

Michael W. Giles, a professor of political science at Florida Atlantic University in Boca Raton, Fla., and an expert on white flight, said in a telephone interview that "any return is encouraging."

But he added that the 9 percent figure does not represent "a dramatic reversal."

In a survey of eight desegregated Florida school districts, Giles found that an average of 24 percent of the students who left for private schools returned to the public schools over a one-year period. The eight districts had been desegregated for from one to five years when the study took place.

In the Florida districts, there were no predominantly white school districts adjoining the newly desegregated ones, Giles added.

In New Castle County, officials estimate that the district has suffered an 1,100 net decline in enrollment because of a loss of students to public schools in other Delaware counties, Maryland, New Jersey and Pennsylvania. The district research focused on private school enrollment and did not determine how many students left the New Castle County School District for public schools and then returned.

Gary Orfield, a political scientist at the University of Illinois in Urbana, Ill., and a specialist in school desegregation, found the rate of return from private schools to public schools in New Castle County heartening.

"It's unusual that there should be that much of a return that soon," he said.

Orfield visited the New Castle County district recently to collect data for a study on the relationship between school desegregation and housing patterns.

He said he found an unusually large number of white youngsters who live in the city of Wilmington returning to the public school system. It should be noted that those students are being bused to suburban schools for nine of their 12 years in school.

Nevertheless, Orfield found the trend encouraging. "There's a back-to-the-city movement all over the country, but usually we find people moving back to the suburbs when they have school age children."

That's not happening in Wilmington, he said. "It would suggest that the back-to-the-city movement in Wilmington would be different than in other parts of the country, because people would be moving into the city and staying."

Superintendent Carroll W. Biggs said he is encouraged by the return of children from private schools to the county district. "The climate in the schools, the discipline in the schools has certainly interested many parents in reconsidering their children's education."

Deputy Superintendent George V. Kirk said,"I think it's what has happened in many school districts once things settle down. I have a basic feeling that white flight will drop substantially if the school system runs well."

Gilbert S. Scarborough Jr., president of the board of education, said the fairly low percentage of blacks in district schools may be encouraging white students to return. About a fourth of the students in the county district are black.

"I really expected a return of many of the children that had sought alternatives to the public schools when their parents saw that the racial balance in the schools was what it was going to be," he said.

White flight is responsible for perhaps two-thirds of the drop in enrollment since the district was formed by the court-ordered merger of 11 school districts.

In 1977, before desegregation, there were 69,953 students in the 11 districts, and there are now 58,459 students in the county district. About 4,000 of the 11,494-student decline is due to a drop in the birth rate. Another 1,500 or so students have dropped out of school.

Enrollment declined by 9.1 percent before the county district opened its doors in the fall of 1978. There was another 8.1 percent drop last fall. And the research office is projecting a drop of more than 8 percent when school starts next fall.

PREPARED STATEMENT OF GARY ORFIELD

During the past fifteen years I have been a close observer of congressional battles over school desegregation. I studied the reaction in the House and Senate when the Johnson Administration enforced the desegregation of the rural South in the mid-sixties and the equally intense reaction of Members from the North and West when the Supreme Court moved to require urban school desegregation between 1971 and 1973. Each year during this period there have been measures passed by at least one house of Congress to limit school desegregation enforcement by the executive branch or by the courts. Each year there have been groups of angry local whites on Capitol Hill sitting in hearings where Congressmen and Senators considered bills to roll back desegregation requirements. Four of the five presidents during this period have expressed their personal opposition to busing to desegregate urban schools.

Congress has not prevented the desegregation of a single school district. It has removed the enforcement authority of the Education Department and forced much more of the burden onto the courts and private civil rights litigators. All of the amendments have created widespread false hopes that the law will be reversed, hopes that spur white resistance, greatly increase the burdens on the educators attempting to successfully manage a difficult transition, and undermine the efforts of the courts to peacefully enforce the law.

This entire period has passed with very few constructive efforts by Congress to make the desegregation process work better. The Emergency School Aid Act, providing federal funds to training and enhanced educational programs to aid in the changes that come with desegregation,was a significant positive effort and that act was substantially improved with the Carter Administration amendments. Apart from Senator Glenn's magnet school amendment there have been few efforts to foster voluntary achievement of school desegregation through educational incentives. Congress has failed to act on a long series of proposals for voluntary city-suburban transfers to aid desegregation. There has been no significant initiative since 1968 which has provided either strong incentives or strong enforcement powers to speed neighborhood integration, which could produce more naturally integrated schools where busing would be unnecessary.

I believe that Congress is, once again, moving toward restrictions on school desegregation that are based on false assumptions and will only further undermine community efforts to make integration work. After discussing a number of these assumptions I will suggest that Congress could play an extraordinarily valuable role in devising a strategy which would make less busing necessary in the long run without sacrificing the goal of integrated education.

Assumptions. Since the beginning of this Congress there have been a number of floor speeches and statements in the Record on the need for anti-busing legislation. Most share some or all of the following assumptions:

1) integration can be achieved without busing
2) both blacks and whites oppose busing
3) education has been damaged by court-ordered desegregation plans
4) minority students have not been aided
5) transportation has a negative effect on education
6) court-ordered desegregation cannot work because of white flight
7) there is some other way the money could be spent that would have more positive results on the education of black and Hispanic children.

The courts order busing because it is the only practical way to achieve full desegregation in the face of intense residential segregation and the lack of any significant national effort to foster residential integration. The great majority of the nation's rural districts, which have relatively little residential segregation, were desegregated in the 1960's and there has been great progress across the U.S. in the desegregation of small cities, through modest use of busing sometimes combined with magnet school plans, redistricting, and other techniques. A good many states with relatively low minority populations have no significant remaining school segregation.

The reason the busing issue is so crucial is that the remaining problems are concentrated in large cities with severe residential and educational segregation. About half of black students in the U.S. and three-fifths of Hispanics attend school in fifty school districts. The typical American city has residential segregation so intense that 80-90 percent of black families would have to move to achieve full residential integration. On a metropolitan level, according to the Urban Institute, residential segregation increased during the 1960-1970 period and there are only limited signs of progress in the preliminary returns of the 1980 Census. There is evidence of increasing Hispanic segregation in central city areas. There is no evidence that existing residential trends will produce integrated schools. In fact a study of all neighborhood schools which had significant black and white enrollment in Los Angeles showed that not one became stably integrated--all were "integrated" for only a few years as the ghetto expanded through a new neighborhood. Much the same pattern was evident for Hispanic-Anglo schools.

If the courts are prohibited from transporting students there will be no practical remedy for students whose segregation has been found to result from unconstitutional actions by local authorities. No school district of large size has ever been fully desegregated through voluntary approaches. Usually, according to the only national evaluation of magnet programs, voluntary transfers outside of a mandatory framework have little if any impact on segregation in large cities. Rarely do such programs produce any significant desegregation in black and Hispanic areas.

Redrawing of attendance boundaries is often a counterproductive remedy in big cities. It tends to accelerate the processes of ghetto expansion and create maximum instability in white areas near minority areas. It puts all the pressure of desegregation on these limited areas that already face the self-fulfilling prophecy of resegregation and encourages white families to settle in areas beyond the reach of the plan.

Busing is an essential remedy for most of the segregation that remains in American education. This is the only reason that conservative federal judges faced with proof of violations have ordered student transfers. Ending busing would mean segregation for many students.

Virtually every speech for anti-busing legislation asserts that both blacks and whites oppose this remedy. It is true, of course, that virtually every survey in recent years shows substantial white opposition. It is not true, however, that most research shows black opposition. It is also true that most Americans have little accurate information about busing and that those families who are actually participating in court-ordered reassignments believe that they are working out by a substantial majority.

A February 1981 Gallup Poll showed that 78% of whites opposed "busing for better racial balance" but only 30% of blacks expressed such opposition. Blacks, in fact, supported busing by a 2-1 margin. A number of studies of black opinion within individual communities where busing plans have been under way for a number of years show substantial majorities believing that their children are receiving a better education and supporting the plan.

Part of the opposition among whites may reflect the inaccurate information they have about school desegregation plans. One national survey, for example, showed that most believed that the court orders cost more than ten times what they actually cost and that many believe that the education of white children is harmed. A 1978 national survey by Louis Harris and Associates found that although 85 percent of whites said they opposed busing, the attitudes of those whose children were actually bussed under a desegregation plan were very different. 56 percent of the white families actually affected by the plans said that the experience was "very satisfactory." The researchers concluded: "The irony of busing to achieve racial balance is that rarely has there been a case where so many have been opposed to an idea which appears not to work badly at all when put into practice." Part of the problem, I believe, has been the continual attack on the courts by elected officials.

Busing is often attacked as a threat to good education. There is no significant evidence that transportation itself has a negative effect on education. About half of American school children are transported to school. Five in six families whose children are bussed for non-desegregation reasons report that they are satisfied with the arrangement. Private school students are often bussed longer distances in older, more dangerous busses. Those children leaving public schools at the time of desegregation in Florida had to travel further to non-public schools. There is evidence showing that it is safer to ride a bus than to walk to school. Busing does not hurt education. The real issue is not busing, it is integration.

Many whites and many elected officials assert that the education of white children is damaged by desegregation plans. This has, of course, been a major theme of critics of desegregation since 1954. There is no significant evidence to show that desegregation orders have any positive or negative impact on white students. This is an issue on which the research is so clear that virtually all scholars agree, whether or not they support the court orders.

There is evidence to show positive effects for minority students from desegregation plans and positive effects for both minority and white students from plans that are accompanied by major educational reforms. The recent National Assessment of Educational Progress showed that the largest gains in educational achievement have been made by younger black students in the South. (The South has had the highest level of school integration in the U.S. since 1970). Several years ago another National Assessment study found the same results.

The most thorough review of all the studies of educational achievement in desegregated schools, conducted by Robert ~~Crain~~ and

Rita Mahard for the National Review Panel on School Desegregation Research, found that desegregation plans beginning in first grade were very likely to produce significant educational gains for black students. Apparently early and continuous desegregation are the key factors in achieving substantial gains.

A recent report from Louisville, where a metropolitan plan was implemented in 1975 shows substantial gains for all black students who began their education since that time. It also shows small gains for whites. In Denver, the first Northern city to implement city-wide busing, all grades exceed national norms in all subjects although the district is three-fifths minority.

Desegregation is no educational panacea. Properly implemented, however, it can produce substantial gains for minority children. With strong educational leadership it can also be carried out in ways that produce new educational choices and stronger curricula and instruction for all pupils. .

During the past six years there has been a strong debate among researchers, lawyers, and officials about the impact of desegregation plans on white flight. There have been many claims the courts are engaged in a futile and self-destructive policy that destroys the possibility of integration in the name of pursuing desegregation. This research has now produced some agreements:

1) desegregation is most difficult and least stable in big cities which have large minority populations and are surrounded by white suburbs untouched by the desegregation plan. Under these circumstances there is an additional loss of white students at least during the first year.

2) central cities have been experiencing white flight and spreading black and Hispanic segregation for many years and school desegregation is not the basic cause. A number of major cities that never implemented substantial busing--such as Chicago, New York, Washington, Newark, and others--have had massive and continuing losses of white students. During the past three years for example, the % losses in Chicago, the most segregated major city, have been far higher than those in Denver.

3) the most stable plans are those that are metropolitan, embracing as much as possible of the housing market area. A number of the South's largest cities have had metropolitan-wide desegregation for a decade.

A recent study of fourteen metropolitan areas by Diana Pearce of Catholic University reports that residential desegregation is now increasing more rapidly in areas with metropolitan-wide school plans where there is no incentive for whites to move to to suburbs to find segregated white schools. Her work also shows less steering of white families to white schools in the real estate market in these areas. Statistics collected by the metropolitan Wilmington school district (New Castle County, Del.) show that since all schools in the metropolitan area have become predominantly white and all children attend suburban schools for nine years, enrollment by white students has been increasing in more than twenty areas in the central city. The Pearce study and the Wilmington data suggest that the most far-reaching busing plans may be the most favorable to achievement of residential integration (and integrated neighborhood schools) in the long run.

It is true that there are special difficulties in implementing busing plans within central cities with large minority populations. It is not true that white flight will stop if desegregation orders are forbidden. Desegregation plans should provide special educational incentives and choices for central city students and should emphasize involvement of the suburbs in such cities. Any constructive effort by Congress in this direction would aid stability, if that is the basic concern.

Much of the criticism of the courts is based upon the premise that the Supreme Court was wrong in the Brown decision and that separate schools can be made equal through spending the busing money on some kind of compensatory education program. Some Hispanic leaders, for example, say that it would be better to concentrate on bilingual education. The following points are important in this regard:

1) the additional cost of busing required by a desegregation plan is usually a relatively small fraction of a school district budget--usually substantially less than a twentieth

2) desegregation plans should include both additional educational choices and strong basic skills and human relations components. The Supreme Court recognized this need in

its Milliken II decision and Congress in the ESAA legislation. Desegregation is a sudden and basic reorganization of an unconstitutionally operated school system. A plan for improvement and resources to implement it are vital components of a successful approach.

3) critics of desegregation also vote to drastically slash compensatory education and bilingual programs and to remove federal controls which were intended to make separate education somewhat more equal

4) no one has a set of programs that could be generally implemented that would achieve large gains for minority children in segregated schools

5) the goal of desegregation orders goes far beyond gains in educational achievement. It is a basic part of an effort to build an integrated society where the basic institution of social mobility, the public schools, is not fragmented into separate black, white and brown educational systems. It is impossible to imagine an integrated society with segregated schools.

What Can Congress Do? Advocates of improved education for segregated black and Hispanic children in our urban centers are now deeply concerned, whatever their position on busing, by what is perceived as a concerted effort by this Congress and the present Administration to cut off all routes to equal opportunity. Title I of the Elementary and Secondary Education Act, which has been the nation's basic response to the plight of schools which serve large numbers of isolated poor children, is threatened by the dual problems of drastic budget cuts and an end to the federal regulations that attempt to assure that the money is spent on the children most in need. When inflation is considered this cut, which amounts to more than 30 % in real dollars, is coming to cities with high, shrinking tax bases, enormous welfare and health care costs that will be driven up by other parts of the budget, and, in several cases, threats of imminent bankruptcy. CETA cuts will take many workers out of public schools.

From the perspective of minority children deregulation only increases the menance of this proposal. At a time when state and city budgets are under great stress these is little chance that the most politically powerless sectors of the society will succeed in holding even those resources that remain in the budget without strong federal controls. In Illinois, for example, public schools face a substantial cut in the real dollars they will have from the state government next year and there will terrific competition over any deregulated federal dollars. In all likelihood it would go into general school district budgets to forestall tax increases.

Many of the existing special programs for inner city children would be eliminated.

The proposal for federal desegregation aid is similar in nature, both a cut and deregulation. This money will disappear into budgets without a trace and the one useful and constructive step that Congress has taken on school desegregation in the last decade will be eliminated. This will no longer be money from outside that can be used to ease a difficult transition--a kind of modest incentive for good planning--but it will be put into the local pot and people who advocate spending it for desegregation at a time of local polarization will be accused of being "soft on busing." If a federal court determines that the federal government is, in substantial measure responsible for the segregation of neighborhoods and schools, there will be a confrontation over funding instead of the accomodations that can be worked out under the ESAA program.

Hispanics are an increasing part of the big city school systems. Whatever one thinks of bilingual education it is vital that Congress recognize the problems caused by very large numbers of non-English speaking students in non-English-speaking neighborhoods who require special assistance and need teachers who can understand them. Both in a regulatory sense and in the budget proposals, the Congress and the Administration appear to be hostile to these needs.

The first requirement for a good Congressional policy is a simple one--do no further harm. Do not destroy the existing programs for segregated minority students without putting something at least as good in its place.

A second useful area for congressional initiatives would deal with incentives. Everyone agrees that it would be better if there could be less compulsion and more incentives for desegregation. Congress should consider incentive proposals, particularly those that have produced voluntary participation by subsurban school districts in desegregation plans in several metropolitan areas. This would be a genuinely voluntary effort, both on the part of students and school districts and would make a significant positive contribution. If one will not support purely voluntary efforts in the face of pervasive segregation, one has no commitment to integrated education.

A third important area concerns housing. The federal government has no enforceable fair housing policy and it continues to finance housing programs under which state and local governments are permitted to increase residential and school segregation and resegregated integrated neighborhoods. Strenthening fair housing enforcement would be a positive step. Including in the community development and housing legislation explicit goals for fostering and helping to stabilize integrated communities would be very important. Requiring that housing authorities devise policies to help minimize the necessity for busing plans would be a positive step. /Courts could be required to exempt integrated neighborhoods from busing./ (There are such requirements in the court orders in Louisville and St. Louis.) Incentives for housing desegregation would be very useful.

A final area is research. There has been no major effort to learn about desegregated education and desegregated housing by federal agencies since 1964. All pending funds for new research in the area were recently cut off in the National Inst. of Education. We have virtually no research on such important issues as the impact of desegregation on Hispanic students, the largest minority group in much of the country. Better policy requires better information and Congress should demand better research. Cutting off this money won't stop desegregation, but it will lessen the possibility that desegregation will be implemented effectively.

Senator BIDEN. He points out that in 1974, for example, there was a total reduction in white enrollment of 2,200—I am rounding the figures off—and that portion which is attributable to white flight—I do not know how he makes that judgment—is 630.

Mr. ORFIELD. What would they have been fleeing from in 1974, Senator?

Senator BIDEN. In 1974, they were fleeing from the pending order. I can tell you that, as a practical fact, there were people who were saying: "This is going to happen. I know it's going to come. I'm going to get into the school systems now."

For example, the biggest flight occurred in 1975. There was a total reduction of 2,800; 710. In 1976, it was 4,700; 2,000. In 1977, 3,900; 1,600. In 1978, 6,000; 4,000. In 1979, 4,000; 2,000. In 1980, 2,000; 520.

I would like to see to it that you get a copy of this. As I said, I had not intended on chairing these hearings, so I had not come prepared to go into the detailed studies. But I will make sure my staff or the staff of the subcommittee gets you a copy of this report, and I would be very anxious to have your analysis of it to give me an indication of whether it is flawed.

Mr. **Orfield**. I would suggest that it might be good to send it to the New Castle school district as well because I spoke with some of their demographers and statisticians last time I was there, and they believe that they are now experiencing nothing but normal demographic decline.

Senator **Biden**. I doubt whether many would argue at this point that that is not true. My contention would be that those who could go have gone.

I would be interested to see, and I am sure we can find that out. I doubt whether there is any space in any of the private schools left in New Castle County—any, period.

I am a practicing Catholic; I support the parochial school system; and so I am suspect, obviously; and my bishop is not going to like it a lot, but busing has been a boon to the Catholics. Although they say they do not encourage it, and they do not, and they are out there speaking about supporting busing, and they did not increase their class enrollments, and all the rest.

We were out in our parish raising money trying to keep the schools open—everybody was leaving. Busing comes along, and all of a sudden they are standing in line—literally standing in line. You cannot get a child in.

So I would argue that the reason there is not more flight now is that there is no place to fly to. Those who could move to Pennsylvania have done it, and that was a big move. And those who could get into the schools have gotten in. Nobody else can make it, and there is no place else to go.

Mr. **Orfield**. It is a pattern we see in these metropolitan plans all over the country, though, that kids who try them stay.

In Florida, for example, where there was a study of eight metropolitan districts——

Senator **Biden**. I am sorry? The kids who try?

Mr. **Orfield**. Who try them—who go to the desegregated schools—see how they are working.

Senator **Biden**. Is it not also the pattern that the kids who leave stay in the private schools?

Mr. **Orfield**. Most of the kids who leave for private schools stay, but there are some who return in some districts, as shown in the clipping from Wilmington.

In Florida, for example, they experienced a net loss of 2 or 3 percent increase the first year of their metropolitan plans and none after that. They did not have any additional loss. About one-fourth of students who went to private schools at first came back. Even in Los Angeles, where they had an extremely chaotic implementation both in 1978 and 1980, the kids who tried, who were in a desegregated school one year, came back the next year with less than the demographic decline.

The crucial fact is whether you are willing to try or not, and the crucial problem is parents—what parents fear and what parents' stereotypes are. The actual experience of desegregated schools, especially in metropolitan plans, is a good one for most children. Children, especially young children, do not know what they are supposed to be worried about.

You hear the most hilarious stories about garbled versions they get from their parents and report to the school people, if you go into schools and talk to counselors and teachers.

Senator BIDEN. I am not unfamiliar with this in terms of either politically dealing with it or practically. My wife is one of those remedial reading teachers in the public school system. She teaches juniors and seniors to read at fifth-grade level. That has nothing to do with busing. That is happening, period. So she is dead center in the middle of it.

But anyway, go ahead. I am anxious to hear the rest. I am interrupting you too much, I am sorry.

UNDERLYING DEMOGRAPHIC TRENDS

Mr. ORFIELD. The second point that the research agrees on in white flight is that central cities have been experiencing white flight and spreading segregation of blacks and Hispanics for decades and that school desegregation is not the basic cause. This is going on, regardless of school desegregation.

Some of our big cities that have gone very far in this process of racial change are cities like Chicago and New York, Washington, Newark, and many others which never had any significant busing plan.

In Los Angeles, when the court began to look at the busing situation, a demographer was brought in to project the existing trends that were independent of any school desegregation plan. He reported, in the mideighties, if there were no busing and the existing trends continued, there would be only 14 percent Anglo students in the Los Angeles Unified School District in the mideighties.

Senator BIDEN. I do not disagree with that. What does that prove to us?

Mr. ORFIELD. It shows that the basic problem that we have of spreading segregation is not in any way related to these court orders. The possible effect of the court order is an increment, especially in the beginning, in early implementation. But we are going in that direction, especially in our big cities, and we have been ever since World War II.

A third point is that among urban school desegregation plans in the country the most stable are all-metropolitan in nature. If you graph all the plans in the country and you look at the relative stability, the ones that appear on the most stable end are metropolitanwide plans.

There is also some evidence to show that thorough-going desegregation plans that reach entire housing markets tend to enhance residential desegregation. Diana Pearce's study of 14 metro areas showed that the areas that were under metropolitan plans were experiencing more rapid residential integration.

Part of this is because one of the reasons neighborhoods change in our society is that the schools change faster. We do not have stable integrated neighborhood schools in this country—with very few exceptions—in the absence of a court order.

A study of all the black and white schools in Los Angeles, for example, showed that none of them was stable before the court order. All of them went through change. Most of them usually changed completely within 6 years.

One of the reasons people leave neighborhoods is that the school changes way before the neighborhood changes because the families who move into an older white neighborhood tend to be younger families with younger children, and they immediately have a very large effect on the elementary school enrollment. That tends to drive the white housing market away from those neighborhoods.

Senator **Biden**. Professor, I hate to do this to you since I have interrupted you. After that budget hearing, I was supposed to go to a meeting to decide on the Lefever nomination where I was supposed to make a presentation, and that has begun. I forgot about that, I got wrapped up in this.

Would you be able to summarize the essential points that remain, and then maybe I can raise two points?

Mr. **Orfield**. Sure.

Senator **Biden**. I told you you had unlimited time—I am sorry.

Mr. **Orfield**. Let me just go to the end and talk about what Congress could do that would be constructive.

I would like to say, first of all, from the standpoint of minority educators and people who are interested in central-city school systems, we are now perceiving a calamity that is not affecting just school desegregation but almost everything that Congress has done in the past to help central-city school systems.

Title I, if you count inflation, is being threatened by a cutback that is almost 30 percent in a single year. This is devastating. That is the only program that we have had that has been targeted to get money to poor children.

The devastation of that is going to be increased by the deregulation proposals. If that money is deregulated, we are now in a situation of extraordinarily tight budgets in central-city school districts to start with.

Senator **Biden**. What do you—"if the money is deregulated?"

Mr. **Orfield**. If title I requirements are lifted and it is put into a block grant.

Senator **Biden**. OK.

Mr. **Orfield**. Those programs that serve the poorest children from the least powerful communities are going to be decimated. There is absolutely no doubt in my mind about it.

The State governments are cutting back educational resources in a great many States this year. We are talking about a 4-percent increase in Illinois, which is way below inflation. We are also talking about deregulation in our State, which has the third largest number of black students. That means that the programs serving central-city school districts and serving poor children are going to be devastated.

The same thing is happening with the programs that are directed towards Hispanic students—the bilingual programs—and the same thing is happening with the Federal desegregation assistance programs. The same thing is happening with the CETA workers that are so important in many inner-city schools. We have got a wide-ranging assault on central-city schools.

The first thing that Congress ought to do, I think, is stop the terrible devastation that they are going to inflict on nearly bankrupt central-city school districts next year. It is absolutely unconscionable. Not only are these children segregated and in unequal schools, but the national policy that is going forward now is going to make that much worse. It is not a "separate but equal" plan, it is a separate and much more unequal plan that we are talking about.

A second thing that Congress could do that would be extremely helpful would be to create some voluntary incentives. The Reagan administration talks about incentives, and I think it is a good thing to talk about.

We have not had any incentives for voluntary action on desegregation that amount to anything, except for the Emergency School Aid Act. It is too small, it is shrinking very fast in real dollars, and they want to throw it into a block grant where it will disappear. It has been the only constructive thing Congress has done since 1968.

I think that that program should be maintained and there should be some other kinds of incentives, especially incentives like those that are available under State legislation in Massachusetts and Wisconsin, to encourage voluntary participation of suburbs, to encourage voluntary transfers.

If one does not support purely voluntary efforts in the face of pervasive segregation, then I think it can be truly said that one has no commitment to integrated education. If all the children are segregated and one will not even support small incentives for voluntary integration, then one cannot say with any good conscience that one has any positive support for this. Congress could help a lot in this area, I think.

A third area concerns housing. There is no enforceable fair housing policy in this country. It is a joke. Everybody who administers it knows it is. There are no enforcement powers in HUD. The process is impossibly lengthy and complex. It does not work. One reason we have spreading housing segregation is that we are not really trying to do anything about it.

Housing authorities around the country are continually making school segregation worse. In New Castle County, for example, the most rapidly resegregating school is affected by administration of a section 8 program which is turning part of the north county area black.

We ought to take action to minimize busing by producing housing integration. We ought to have a policy in the community development legislation that calls for support and maintenance of integrated neighborhoods that are threatened by governmental housing policies and many other policies now. We ought to have a positive housing desegregation policy.

Then if we had that, it would be appropriate, in my judgment, for Congress to require that the courts exempt the residentially-integrated neighborhoods or those that become residentially-integrated from any busing requirements. The court in St. Louis and the court in Louisville have already done this, and it is very constructive. Those neighborhoods are holding their population. And any neighborhood that becomes integrated ought to be exempted.

The final area is research. Congress has not asked for any significant research on school desegregation since 1964 when part of the

1964 Civil Rights Act called for a national study. Congress is flying blind in a lot of these issues.

We just learned in the National Institute of Education that there will not be any significant new commitments of research money during the next several years for any desegregation research. We know almost nothing about such important issues as desegregation of Hispanics.

Congress ought to insist that good, high quality research be done that addresses the issues they are concerned about. Without that, it simply will not have the information that is necessary to make intelligent decisions.

Senator **Biden**. I thank you for your concise and comprehensive statement. I would like to make several comments.

First of all, I have a series of five or six questions that Senator Hatch would like to ask that I am not going to have the opportunity to ask, so I will submit them to you in writing and ask if you would submit the answers for the record.

Without objection, they will be included in the record.

The second point that I would like to make is that I was going to discuss with you an article in the New Republic issue of this week by John H. Bunzel entitled, "The Wrong Way Bus Ride." I am not going to have a chance to do that, but I will send you a copy of that if you have not already seen it, and I will ask you some questions off that, if I may.

Mr. **Orfield**. OK.

Senator **Biden**. Without objection, it will be included in the record at this point.

[Material to be supplied follows:]

GARY ORFIELD

RESPONSES TO QUESTIONS
FROM SENATOR HATCH

#1 A dual school system is a system with segregated schools which have been found to be the result of a pattern of unconsitutional actions by state and local authorities. The courts have ordered busing only where they have found a history of unconsitutional segregation resulting from laws openly requiring segregated schools and housing and a wide variety of actions such as gerrymandering, faculty segregation, selection of school sites which impeded rather than fostered segregation, location of subsidized housing where all the children must attend segregated rather than integrated schools, provision of unequal schools and educational programs, optional attendance zones that undermine integrated neighborhoods, and a number of other violations. Virtually all cities whose history has been carefully examined by the federal courts show a number of official actions fostering segregation.

#2 There is substantial factual agreement among Prof. Coleman, many of the other researcher in this area, and me on certain findings from the white flight research. I strongly disagree, on the other hand, with many of Dr. Armor's conclusions and methods of analysis in research which grew out of his efforts, as a consultant to a number of school boards fighting desegregation orders. I strongly disagree with the policy recommendations made by both Coleman and Armor.

The fact that there is a substantial and sometimes very rapid decline in the enrollment of white students in big city schools is undeniable. Researchers agree that the great majority of this long-term decline has happened and will happen whether or not there is a desegregation order. I share the view expressed by Coleman in his research that plans limited to central cities with high percentages of minority students where there are readily accessible suburbs or private schools untouched by desegregation produce the greatest initial loss of white students when desegregation begins. Conversely, the greatest success has been achieved in big cities in metropolitan plans, most of which have produced a much smaller initial loss and no incremental loss after the initial phase. I believe that metropolitan-wide desegregation is the best policy in most large metropolitan areas where the central city school district has a small white enrollment.

#3 This argument was, of course, made by the South in the arguments before the Supreme Court before the Brown decision and was rejected by the Court. The question carries the implication that blacks and Hispanics might better be left in inferior segregated institutions because they are not really capable of competing. I most emphatically reject this argument and all that it implies.

It is true, of course, that desegregation, like virtually any other human undertaking, can be carried out in a positive or a negative way. In desegregation cases we expect the institutions found guilty of violating minority rights to suddenly change their ways of operation. Actually, of course, changing attitudes of teachers and staff, working out new relationships among previously segregated children, devising appropriate educational strategies, and building respect for the new group of students into both the curriculum and the life of the school are very great challenges.

We have substantial evidence that desegregation is a very real educational benefit for children who start out in desegregated schools and remain in them. They do not have to deal with so many changes. Research is now showing how to significantly improve the operation of integrated schools and develop better race relations within them. Recent findings about the role of the principal in setting the tone of the school, the importance of impartial rules, the significant gains attainable through cooperative study in inter-racial groups, and other dimensions of in school activity are providing very valuable insights. I believe that we now know how to operate desegregated schools that will have both positive educational and social results.

4. Our educational system should not be expected to bear the entire burden of integrating American society. I do not know of any supporter of school integration or any educator who believes that it should. Schools are placed under this burden because of the pervasive residential segregation of our society, the lack of any effective program for fair housing and open communities, and the much greater ease of devising policies to regulate an insitution that is in the public sector than a very highly fragmented private sector industry that has pervasive segregation.

I recently completed a study of twelve cities with school desegregation orders for the Ford Foundation. I found that, with a few very limited exceptions, that even cities that are carrying out large-scale busing for years rarely develop any coherent policy to encourage integrated housing. A study I completed for HUD in February showed that in three large metropolitan areas (Denver, Phoenix, and Columbus) subsidized housing continues to contribute significantly to segregated education. In other words, school authorities are forced to bus more children, even after court orders, because of housing decisions that undermine their work. HUD has not had effective policies or even data collection in this area. The present Administration is moving to give up even the limited incentive programs that were in existence. The recent private-sector-oriented programs show high levels of segregation and I am convinced that the record will be even worse when more discretion is granted to states and localities.

I believe that we now know a number of policies that are not coercive that could have a positive impact on residential segregation without violating anyone's rights. Fair housing counseling of both subsidized and private market minority families can, for example, have a substantial impact if done by experienced professionals. There needs to be an active supportive policy from HUD to stabilize existing integrated neighborhoods and suburbs and help those that become integrated in the future. Every big city has had a great many transitional neighborhoods with temporarily integrated schools. Unless there is an organized effort to support integration, however, most rapidly become resegregated. A number of metropolitan areas now are experiencing rapid ghettoization of suburbs, such as is happening in parts of Prince George's Co., Maryland. Without policies to support stable integration we will repeat the history of the inner city in wide swatches of suburbia.

The present housing policies are too weak to make any significant dent in a pattern of intense residential segregation. The policies that are now evolving in the Administration and Congress will probably be substantially worse. Until our leaders recognize the need for a serious housing desegregation policy the burden will inevitably fall largely on the schools if there is to be any integration at all in our cities.

The courts may move to address some of these issues. In the St. Louis desegregation case the federal court has directed the City, the State, and the federal government to develop policies for administration of housing programs that will tend to foster school desegregation in the metropolitan area. This could be the beginning of an important new trend. The St. Louis court has exempted residentially integrated areas from busing and guaranteed that areas that become residentially integrated in the future will be exempted.

5. Busing, as I stated in my testimony, has no significant impact. If the question means which communities have experienced successful school desegregation I would say that most have experienced some success but that success has been greatest where the following conditions were present:

    a) the community and its educational leaders supported integration
    b) where integration has been in effect for a number of years and most children in school have not experienced segregation
    c) where the faculty and staff are well integrated and offered appropriate training in adapting to a changed school community
    d) where the plan or court order reached as much as possible of the housing market area and was as equitable as possible throughout that area
    e) where teachers have employed classroom techniques designed to foster successful integration
    f) where educators have taken advantage of the reorganization brought by desegregation to implement new educational reforms and to offer students and families new educational choices

The most serious difficulties have been experienced in districts where there has been massive resistance and encouragement of resistance by top officials, where desegregation is just beginning and there are junior and senior high students suddenly in contact with a different group for the first time, where the faculty remains segregated or openly prejudiced, where the order includes only a small fraction of the metropolitan area, where the school district faces bankruptcy, and where the educational leaders join the resistance and offer no educational vision or assistance to their own staff at the time of transition.

6. It is true of course that neither courts nor administrators can or should exercise precise controls that would determine for all time exactly how many students or each race attend each school. I do believe, however, that we now have experience in many rural communities, small cities, medium sized cities, and very large metropolitan areas which demonstrates the conditions under which stable and continuing desegregation can be achieved. It is very important that we not only create a plan that looks good on paper and transfer students but that we try to build in policies and incentives that will break the very powerful momentum of spreading segregation we have in our cities, whether or not there is a court order, and begin to create forces that work for stable integration. This can be done. It has been done in some communities. Unless we want to be a fragmented and deeply divided society with little expectation of a stable future we must try to do it. School desegregation is an important element but it should be a diminishing one if we are ever committed to integration as a basic goal of urban policy. The question implies that it would be better to do nothing. In fact, we should do more and I think we know how to do it in ways that would have very great long-term benefits for cities and our society. We have been rapidly building segregated cities since World War I. The same patterns are appearing in the great new cities emerging in the South and West. One only has to walk through the South Bronx, the West Side of Chicago, Watts, or their counterparts in dozens of cities to know where that leads. The courts have been the bearer of the bad news that this did not happen by accident and that it will be difficult and controversial to reverse the trends that have been created. If Congress merely attacks the courts and denies the basic realities that they have been forced to deal with it will be both a headlong attack on minority rights and hopes and a massive failure of leadership. It is not a conservative policy--the only true conservative policy is to defend the constitutional order and to work for a situation where social stability will be assured because minority families believe they are part of the society and have a fair chance within it. To attack the courts and do nothing else is reckless radicalism---it is undermining the belief in the legitimacy of government and its legal system for minority citizens and raising the ante in a massive gamble that the society can succeed in the long run with profound racial cleavages.

THE WRONG-WAY BUS RIDE

(By John H. Bunzel)

The U.S. Supreme Court declared in 1954 that dual school systems and other forms of *de jure* segregation were to be eliminated. It also ruled that it was unconstitutional for a state to segregate blacks from whites on the basis of race or to use racial classifications to limit the opportunities of all its citizens. This was a monumental development which, in the next 25 years, would affirm that it was wrong to distinguish among people on the basis of color or ancestry and that every assault on discrimination was grounded in the law of the land. Although it did not remove the poison of racism in American society, it profoundly changed the character and condition of our major institutions.

Although the landmark decision upheld the constitutional principle of school desegregation, it did *not* call for affirmative integration. Nor was it intended to promote a particular level of integration, much less judge-made policies of school assignment. The distinction is important. Desegregation does not necessarily mean integration, any more than integration is the only definition of equality. This understanding of the *Brown* decision was reflected in the specific language of the Civil Rights Act of 1964: "Desegregation means assignment of students to public schools and within such schools without regard to their race, color, religion or national origin, but desegregation shall not mean the assignment of students to public schools in order to overcome racial imbalance."

The first federal school desegregation legislation was enacted as part of the Civil Rights Act. It authorized the government to take a major role in desegregating schools. Even though the authority was of several kinds (for example, to sue and to provide technical assistance) the government's primary power and tool became the withholding of federal funds. However, Section 407(a) of Title IV did not authorize federal officials to issue any directive for achieving equal racial composition in schools by transporting children from one school to another.

In the past 15 years it is the courts that have mandated busing as a remedy to eliminate school segregation. Not only has there been a change in interpretation of what desegregation meant in *Brown*, but the prescribed objective has become integrated schooling, a goal which the schools have been ordered to meet to comply with new constitutional standards. Moreover, in light of wholly different criteria adopted by the courts, integration now has also come to mean a statistical racial ratio that can be achieved only by busing students out of their local schools. In short, by whatever coercive action the courts have deemed necessary, *Brown* has been reinterpreted to mean racial balance in the schools.

In communities throughout the country, attempts to carry out policies or court orders requiring integrated schooling have met with widespread opposition. Although public opinion polls show that most Americans believe white and black students should go to the same schools and thus support the principle of integration, the overwhelming majority is opposed to compulsory busing. No matter how the questions have been worded in polls conducted in the 1970s, rarely have more than 15 percent supported court-ordered busing to achieve some quota of racial enrollment. The unpopularity of busing is also found in both major political parties. NBC News reported in 1976 that only 16 percent of Democratic primary voters and seven percent of Republican voters favored busing. Further, neither blacks nor whites have approved of busing in majority proportions. Louis Harris, for example, has shown that only 38 percent of blacks favor busing.

It is not necessary to believe that "the voice of the people is the voice of God" to recognize that in a representative democracy public opinion is and should be an important force in politics and has always been relevant to the purposes of public policy. Thus it can be said that it didn't take last year's presidential election to show that strong majorities in the country want to end court-ordered busing. A critical question is how.

At the end of the last session of Congress, an attempt was made to attach a rider to the continuing appropriations bill that would have barred the Justice Department from bringing any legal action to require school busing. In the face of a veto by President Carter, it was removed by House and Senate conferees. Sponsors of the busing ban have promised to reintroduce the issue in the new Congress and President Reagan has said he would sign it.

One of the many problems with this proposed course of action is that it raises serious questions about whether such a ban involves an unconstitutional encroachment by Congress into the executive and judicial branches of government. Furthermore, would the banning of "any sort of action" prevent the Justice Department from bringing school desegregation suits altogether? By limiting the kind of remedy the department could seek, would Justice be prevented from ensuring that federal funds are spent in a nondiscriminatory manner? Former attorney general Benjamin R. Civiletti concluded that putting new restrictions on Justice "could disable the executive branch from taking any action to prevent the government from participation in a constitutional violation." Apart from these legitimate concerns (among others), there is an important and more practical question: is this particular approach the best way for Congress to give political expression to its feelings about busing and to determine how best to enforce what Senator Jesse Helms calls the "mandates of the Constitution?"

There are equally good reasons to be unenthusiastic about efforts to prohibit court-ordered busing by a constitutional amendment. This is not to deny that the "imperial judiciary" has stood virtually alone in advocating school busing or that the balance of power in areas of social policy has shifted toward judges (and also to toward appointed officials in the federal administrative agencies) who are not directly responsive and accountable to the people. But the fact remains that a constitutional amendment involves a long and tortuous process which, as history demonstrates, is unlikely to be successful. On only four occasions have constitutional amendments been passed to overturn Supreme Court decisions.

There are additional objections to banning compulsory busing by constitutional amendment or by other forms of direct democracy such as recall, initiatives, and referenda. One reason James Madison preferred a representative government to a pure democracy was because representative government protected individual liberties and rights from abuse by unrestrained majorities. Legislators, as politicians, are required to consider their constituents' feelings but also to practice the arts of compromise and accommodation. Constitutional amendments and referenda make compromise difficult because complicated issues are reduced to a simplistic choice of "yes" or "no."

Seventeen years ago there was strong public support of the Civil Rights Act because most Americans share the traditional liberal commitment to equality of opportunity. But, as they consistently said, they do not believe in compulsory school busing. That is not their idea of what equality should be all about. No president has every publicly and unequivocally called for busing either. Nevertheless, busing has become part of a major distortion which has occurred in the liberal tradition of equal opportunity. This transformation has occurred for two reasons: first, because civil rights groups have grown in political importance and fervor, and (particularly in Democratic administrations) wield influence out of proportion to their size. Second, the courts and bureaucracies have dictated solutions that should have been developed by our elected representatives.

The time has come, therefore, for a thoughtful and comprehensive reexamination by Congress (in the words of Justice Lewis Powell) "of the proper limits of the role of the courts in confronting the intractable problems of public education in our complex society." Congress could begin reasserting its own powers and responsibilities by modifying the direction the Court has taken when it has accepted busing plans that transport students across city-county, city-suburbs lines, even when this involves busing between wholly separate political jurisdictions. However, the Court has not always ordered that this be done. In 1974, in *Milliken v. Bradley*, the court ruled that busing across municipal boundaries was not necessary in the Detroit area, because there was insufficient evidence of segregation based on state action or segregative intent by suburban officials. But in 1979 the Court upheld sweeping federal court busing orders in Dayton and Columbus, Ohio, ruling that the two school systems had the "affirmative duty to eliminate the effects of past discrimination even if it no longer discriminates." If integration is truly a constitutional proposition and therefore a just remedy for the nation's past wrongs, why should only some school districts be integrated through mandatory busing, but not others whose history is not significantly different?

Another persistent problem has been that judges have gone beyond their range of perception or knowledge. The Supreme Court performs a major and proper function when it reminds us from time to time that the Constitution is a living document, and that its "evolving applications"—in *Brown*, that segregation is wrong and must be ended—often represent our best traditions and values. But the Court is not empowered to define our ligitimate or even obligatory egalitarian goals and the means by which they should be attained.

In the spirit of "new beginnings," the new Congress now has an opportunity to express how it feels about the redefinition of equality—whether, for example, it believes equality of condition and result rather than of access and opportunity should be the defining principle of American egalitarianism. It could restate with unmistakable clarity the intention and purposes of the Civil Rights Act and then go on to develop additional guidelines for the courts and federal agencies. Congress should start by holding extensive hearings to lay the basis for sound legislative action. In a process of careful fact-finding that the courts could not easily disregard, Congress should call on parents, school officials, and experts from around the country to answer the question: has mandatory busing worked? Almost certainly, the burden of the evidence would be that instead of expanding opportunities for nondiscriminatory public education for children of all races, the busing plans ordered by the courts too often have been destructive of their own integrationist goals.

Some important findings would emerge from the hearings. First, "neighborhood schools" may have been used as a code phrase for racism by some parents. But for many more, such schools are, in the words of one mother who also believes in the principle of integrated schooling, "one of the few thin spiderwebs of community in a sprawling, impersonal city." In Los Angeles, for example, it is not true that racism is the dominant consideration among opponents to busing. David J. Armor, a senior social scientist at the Rand Corporation, has found from his studies that white students are not participating in large numbers in the court-ordered busing plan because the bus rides are too long and the academic achievement at the minority receiving schools is too low. Race does not show up as a statistically significant factor. It is likely that large numbers of white students would refuse to participate in the Los Angeles busing plan if the schools to which they were assigned were mostly white but were also a long bus ride away and had low achievement scores.

Second, there is no conclusive evidence that school desegregation programs have resulted in significant achievement gains for black children. At one time Professor James Coleman believed that the academic achievement of lower-class black students would improve if they attended schools with white middle-class majorities. His claim formed one of the pillars of the busing decisions and racial balance plans of the past 15 years. New studies, however, have demonstrated that the earlier belief was ill founded. Professor Coleman now reports that "there are as many cases where achievement levels decline as where they increase. Thus the notion that black children will automatically increase their achievement in integrated schools is shown to be false." Achievement is not unaffected by desegregation, but is about as often affected negatively as positively. "More than anything else," Professor Coleman says, "this shows that the opportunity the Brown decision created has been lost: if desegregation had been carried out appropriately, it would have meant a net gain in the achievement of blacks; but carried out as it has been, the gain has not been realized."

One of the most discouraging consequences of so many of the present mandatory busing policies in large cities is that they are making integration much harder to achieve. As William Raspberry has put it, "unlawful segregation is being replaced by legal resegregation." Almost predictably, white families have moved to the suburbs to avoid having their children treated as numbers in abstractly moral but thoroughly unpopular and disruptive court-ordered busing plans. The public school system has become a major casualty of court-ordered busing as growing numbers of parents demand some kind of support for private schools (tuition tax credits, voucher systems, etc.). Whether brought about by the courts or by HEW administrative action, "destructive desegregation" through busing was never part of the *Brown* agenda.

Third, congressional hearings could establish that various communities in the country have scored successes with alternative programs to foster school integration, such as vountary busing plans, magnet schools, and voluntary school-transfer programs. If one outcome of Congress's inquiry is to impress the courts with the level of public dissatisfaction with mandatory busing, another should be that Congress supports and encourages voluntary integration efforts.

Americans continue to believe in the fundamental importance of education as the primary means of attaining full citizenship in our diverse, multi-group society. But most Americans do not regard integration that is enforced by court-ordered busing as one of our basic goals, among other reasons because they do not consider integration to be the only important value with a bearing on education. As Harvard Law professor Lance Liebman has pointed out, the pursuit of mixed schools may well be a significant value—one worth pursuing in one's daily life and in one's political activities, "but it is not a *constitutional* value, one that must prevail against other important considerations, even against such ordinary values as economy, reduced transportation time, and neighborhood autonomy, and certainly not when perceived to be in conflict with the effectiveness of the educational process itself." Accordingly, Congress should reaffirm its own allegiance to the *Brown* decision of 1954 and should place on the public record once again both its commitment to a desegregated society and its strong conviction that it is morally and constitutionally right to achieve it, but not by imposing on the schools an artificial racial balance through compulsory busing. Congress would draw the line at the mechanical process of busing students to accomplish mathematical integration.

The proposal for congressional hearings assumes that the question of busing to achieve racial balance in the schools is as much political as constitutional in nature and therefore should involve greater participation of the political process in the ultimate resolution of the issue. The responsibility and authority of the Court to determine the constitutionality of busing would not be (and could not be) circumvented. But judges cannot replace elected officials who are politically accountable. Furthermore, if integrated education is ever to become genuine and enduring public policy, it cannot be the work simply of judges and bureaucrats. It will need to rest on a national commitment that is not evident today and that can only be developed and sanctioned by the political process. Justice Oliver Wendell Holmes Jr. once remarked that legislatures, just as much as the courts, are the guardians of the liberties and welfare of the people. Congress should confront the critical issue of how equality in the United States derives its meaning as well as its limits from the larger system of democratic values to which it belongs. A fact-anchored inquiry of the sort being proposed here could explore whether mandatory busing to bring about school integration has in fact served the country well, with the kind of participation and exposure to public view that will keep the American people informed and involved every step of the way.

Senator BIDEN. The third point that I would like to make is that I agree totally with your basic premise. It is my thesis that the courts would not be busing and the courts would not be doing a lot of the things they are doing if the Congress had met its responsibility.

Congress has shirked its responsibility in the whole area of school desegregation, or desegregation, period, until the courts forced it upon them, as they should have, in the early fifties. Then, the court continued to, in my view, come forward and come up with more and more innovative means to counter the innovative efforts to obviate the court order.

I would also—and this is a very presumptuous thing to do—send you a copy of a speech that I delivered at the University of Delaware series on the future of the American judiciary this December. I would like your opinion on that.

Fourth, I agree with your basic premise on at least five of your points. You have made five essential points here today: First, you have said busing is not all that bad, it works pretty well, and it is needed. Then you said there are four things that Congress should not be doing that they are doing or doing that they should not be doing, and you cite title I, the block grant question, the voluntary incentives, and fair housing.

I would like to take you back a little bit—back when some of us who were labeled as moderates or liberals starting talking about busing not being a good idea. I guess 1974 was when it really started. We used to get commitments from our conservative friends—who then were in a very small minority in the Senate, and we were not listened to very much by our liberal friends at all—that if, in fact, we proscribed busing in any way—administratively like the Eagleton-Biden amendment has done with regard to HEW, which I am sure you are not too crazy about, I assume you are not—or attempts to proscribe the courts' use of busing as a remedy. We used to get assertions.

I would stand there and say: "Now, of course, you understand that if we do this it does not allay the concern or need to spend money in areas where there is a problem, it increases it. This is a two-fisted approach. One is that you stop busing. The other is, though, you do not pretend the problem has gone away. You deal with the problem. And that means more money for title I, it means bilingual dollars, it means the fair housing bill"—which I cosponsored this year on this committee with Senator Mathias, because I agree with your assertion.

What has happened is, as the Congress has changed, those folks who made the second half of the commitment which was: "Well, we are going to take care of the problem; just don't employ a remedy that doesn't make sense"—and I happen to agree with them, which I am sure we will have a chance to argue about on many more occasions—but I am finding that other part of the commitment has gone. I do not know how we can say both: I do not know how we can say busing does not work, let us stop that. The argument always used to be: "Yes, there is a problem, but busing is just the wrong remedy." That is basically my position—busing is the wrong remedy.

I do not hear any of these folks coming along and saying: "All right, busing is the wrong remedy. Here is the right one. Here is what we do. Here is the commitment we make." The only thing abroad today seems to be, let us stop busing and forget about these other problems, because you are dead right—when we go to block grants, I do not know anybody in America who thinks that those inner-city schools are going to get those remedial reading teachers. I do not know anybody in the country who thinks they are going to turn around and see to it that the least powerful constituencies get big chunks of those moneys. And the same with fair housing, if you do not have an enforceable policy.

One of my arguments is that we are asking the education system to solve a societal problem that the education system is not big enough to solve, even if it were constitutionally warranted, which it is not. You were talking more as a political scientist and sociologist today than as a constitutional expert. But your basic thesis, as you started off, seems to be that you cite the residential segregation that exists in America.

My fundamental disagreement with you and others who have your point of view is that we are attempting to solve in our education system, through our education system, on the backs of our education system, a problem that it is not capable of solving. It needs a multifaceted approach, and it has to lead with the problem—residential segregation.

So I do not know how you can say that we are going to deal with the problem by eliminating busing and not doing anything about residential segregation, or we are going to deal with the problem and not do anything about targeted programs for children in need.

The sociological arguments come back to the fact that integration is a necessary long-run policy if this gyroscope is not going to come out of kilter and spin apart because we are such a heterogeneous society and becoming more so instead of less so, as a nation. So we say the social policy is that we have got to do something about that. The biggest chunk of the problem is in employment and housing, and yet we are saying to education: "You are the only one that should do it. You are the place that takes that burden." I do not think they can solve that problem. I think it is putting an incredibly disproportionate load on the back of an instrument that cannot produce the result for the stated and acknowledged problem that exists.

We would have to be fools to not suggest that something has to be done to make this society more integrated, just in terms of its attitude. Something has to be done, but I just think that what we do is undermine the willingness to attempt to make those kinds of judgments, to spend those kinds of dollars, to take that kind of initiative, whether it be housing, employment, or anyplace else, by taking the most vulnerable part of the system—the one that goes to the heart of people's real or imagined concerns, and sometimes in politics they are not distinguishable, and it does not make any difference whether they are real or imagined, in fact. And we say to that component of the system: "You are going to solve our problem." I do not know how it can do that.

That is more a speech than it is a question. But, as I said, I am sure this is not the last time you will be asked—and I hope you continue to appear—to be here before the Congress. Just understand that there is a change politically in the country, too. It is not merely the George Wallaces of the world who say: "You ain't going to bus my baby across town." It is not merely people who say: "We are just wasting gas." It is not merely people who are reaching for straws because they really do not want to go to school with black people. It is really not that at all.

There are a lot of people moving along—in the political system anyway, and I will not comment on anywhere else—in political leadership who are what you would characterize traditionally and historically as moderate to liberal who have very strong credentials in all other areas of civil liberties, education, and all those questions, who are saying: "Busing is counterproductive, if for no other reason than it diminishes our constituency for the kinds of change we have to make in order to deal with the problem."

My concluding comment would be—and I know we did not discuss this here today—that I am absolutely convinced that it is not a constitutional imperative. It may be a sociological imperative, it may be sound social policy—which I also argue with—but it clearly is not a constitutional one. I think what happens, Professor, and what I do not think many of the social scientists are observing—just talking about the raw politics of it—is that we are losing a constituency, a constituency that basically said: "Yes; I am willing to move along. I am no great bleeding heart liberal. I wasn't marching in integration marches in the 1950's and the 1960's, but I think we should do more for black people. I think we should do more to integrate society."

That constituency is leaving us, leaving guys like me who say: "We have got to spend more money on title I, we have got to spend more money on these programs, we have got to pass the fair housing bill, we have got to do these things." But there is no constituency out there. People are fed up.

So we can cite all the sociological studies, all the random samples, all the polls, but that does not communicate to the folks out there. It is simple: We have a Congress that has just raped the education system. The U.S. Senate has just raped it. It has gone. We have not cut, in fact, 15 percent. In real terms, it is more like a third. And what is going to happen when we do not have these remedial teachers? Everyone says "back to basics." We are not giving them money for "back to basics."

One of the things everyone forgets is this. We are all upset with federalism. We are all upset with the Federal Government. We have a lot of reason to be upset with the Federal Government. I would like to remind everybody that the reason the Federal Government got into the business of these things in the first place is not unlike why the courts started to nose in places they should not have been, in my opinion. It is because the responsible body did not do what they were supposed to do. The reason the Federal Government got into a lot of this is that the responsible bodies of State legislatures did not move.

I would be surprised—overwhelmingly pleased, but surprised—if, now that we are pulling out, they move in and act responsibly. I do not know what all that adds up to, except that it does not all add up. You cannot put it in neat little boxes. You have no constituency, at least not a sufficient constituency of the basic, middle-class, taxpaying person who is neither prejudiced nor Joan of Arc liberator, just a normal, everyday person. They are not prepared to play any more, because they look at busing as the quintessential example of stupidity.

It complicates things for them. It takes their children. They do not understand why, it is the quintessential example of Government gone amok. And I truly do not believe they say that or believe that out of an anti black or anti-Hispanic or anti anything movement. It just does not seem to make commonsense to them. I applaud you for the reason with which you approach these things—and I am not being facetious, I really mean it—and for the fight that you are making—you and many others—in pointing out the second half of this—that we cannot cut all of these other programs, too, and expect something miraculous to happen.

But I would really urge you to look at the nonstatistical analysis of what is happening out there. You do not have a constituency any more.

Mr. ORFIELD. Senator, if I could just take a minute to respond, we are in a time, in my judgment, much like the long period between the Reconstruction and the fifties, when people wish that this issue would go away, when the demands of blacks and Hispanics are going to become invisible and not very powerful. People say: "Go back to your place. Stop bothering us."

Not only do they do that, they cut off all the other avenues of equality as well as the only constitutional remedy.

Senator BIDEN. I do not think they are saying that. They were not saying that.

Mr. ORFIELD. That is what is happening in the Federal Government, and in the State governments, and in local governments. If everybody is doing that, and then you ask black people and Hispanics to give up their only constitutional remedy to a proven constitutional violation, then you are supporting a segregation system that has no alternative whatever, Senator.

Senator BIDEN. Sometimes my staff accuses me of being too idealistic about what motivates people. I really do not believe that is what the people are saying.

Mr. **Orfield**. I did an analysis of the voting records of the Members that support the antibusing measures in the Congress, and most of them are not like you. Most of them also oppose voting rights, and most of them oppose fair housing, and most of them oppose compensatory education. They do not favor anything.

Senator **Biden**. That is exactly true. That is why I made the George Wallace analogy. In 1968, in law school, I wrote an article saying that busing is a stupid idea. And this is coming from a guy who did march, who was a civil liberties lawyer, who did all the fence work, a public defender who is on all these civil rights issues who, but for this issue, has a "perfect record."

One of the reasons I was reluctant to say anything is that I did not want to be associated with those folks. I did not like being near them. I did not want to be with them. I did not want to be any part of it. I figured, if George Wallace was saying it, then it had to be bad.

Mr. **Orfield**. You were right then, Senator.

Senator **Biden**. I am right. I was right then about him and his motivation. But sometimes even George Wallace is right about some things. One of the things that is happening in this country is that the American people have given up because we are not very innovative.

Let me move off busing to make my point, and then I will end my part of it. Let us take the death penalty. Everybody wants the death penalty now. We are going to hang everybody. Do you know why they want the death penalty? Because stupid sociologists and guys like people who sit up here in my job for years kept telling them: "We know how to rehabilitate." They do not have the slightest idea how to rehabilitate. Our entire criminal justice system is premised on the point that you sentence someone based upon the amount of time it will take to rehabilitate them.

So the American people, because they are basically good, like most people in my opinion are, went along and said: "We'll buy that." And they bought it for 20 years. And it does not work. It flat out does not work. So, what are the liberals, but Joe Biden and a few others like me, saying? And I get killed by my liberal constituency for saying it. I say: "Hey, let's forget about rehabilitation. We do not know how to do it. Say it. Boom. Tell them. Because if you don't, you know what is going to happen."

I will not mention any present-day Members of the Senate, but let us go back to my George Wallace analogy. I can pick on him. You are going to have George Wallace walk in and say: "Hang them and them pointy-headed judges."

Eventually, the people are going to get so frustrated between the liberal sociologists and politicians who say: "We must rehabilitate our fellowman; we must help them," and then they see Richard Speck come up for parole, even though he did not get it, and they say: "My God, why should that be?" So, guess what? Now they only have one or two things to choose between. They choose between Strom Thurmond's view of "hang them" or continue business as usual. They are turning to Strom Thurmond's view, not because they are vindictive or blood-thirsty but because they know they only have two alternatives, and given the alternative they are going to give up the one side and go to the other.

I realize I am in an overwhelming minority in that point of view. All of the people I speak to in your relatively same positions in other endeavors I think miss a basic point about the structure of the American people, and we get lost in looking at the forest for all the trees and all the numbers. They are good people, but they know what does not work.

We do not know how to rehabilitate, and yet we continue. That is the same garbage. That is the only thing they are given. You continue with the system as it is. I do not hear any of your counterparts in the criminal justice field who are viewed in the same spectrum come along and say: "You know what we need to do, we have to acknowledge we don't know how to rehabilitate." We say: "Oh, we have to try harder." That is mularky—flat out mularky.

So, when a guy like me stands up and says: "Hey, guess what? Unless we get minimum, mandatory life imprisonment, no probation, no parole, no apology for punishment for capital offenses, I am going to vote for the death penalty." I do not have any moral objection to the death penalty. My objection is that we kill the wrong people. But it is the same way with busing. Busing is the rehabilitation of the education system. Just as rehabilitation does not work, they are convinced, and I am convinced, busing does not work.

The reason you are losing your constituency, and I am, for all of these other programs is the same reason people are not listening to Joe Biden when he says: "Let's spend more money on prisons to make them habitable." All they do is point to that one thing and say: "Look at that. It is obvious. Any idiot knows that is not working." Whether they are right or not, that is their perception, and it is not based on their desire to not want to help people or their desire to want to go after black people. The folks are pretty good.

Mr. ORFIELD. Senator, one of the reasons there are no alternatives in the middle is that Congress has failed to provide them. They have failed to provide the housing remedies.

Senator BIDEN. It is a two-way street.

Mr. ORFIELD. You are saying that blacks have dropped their rights——

Senator BIDEN. I will compromise if you will compromise, is what I am saying. I am saying that if guys like you say: "Okay, let us go to something else besides busing," I think we can get a lot of the people to come around and say: "Okay, now we will go for the stuff that Biden and you want, like more money for education." I truly believe that. But we are not going to get it the other way.

Well, I was supposed to be talking about Lefever, a man whom I think a great deal of, and want to make sure he does not get his job.

Mr. ORFIELD. In the Los Angeles case, for example, I proposed that the school district use some of its vacant sites to produce housing for minority families so that it could exempt neighborhoods from busing. A school board lawyer told me he took that to the board one day, and he found out they were even more opposed to housing integration. And I found this kind of thing true all over.

Senator **Biden**. Let me tell you one little thing: Joe Biden used to be a county councilman. Joe Biden ran in the year 1972 at 29 years of age against an extremely popular fellow, a two-term Senator who everybody said was going to be a walk. This was before all the changes and trends that occurred.

Joe Biden was a lawyer who did work for the black community, represented the Black Panthers at the time they were burning down my city, was a criminal defense lawyer, and the proponent of public housing in the county that election. And, guess what? I won.

I went out to those same counties, those same neighborhoods, and I said: "I want to put a public housing project in your neighborhood." It is a matter of record. I am not exaggerating.

Do you know why they did it? Not because there is anything so special about Joe Biden, but because of the same point I am trying to make here. Do you know what I said to them, which got me clobbered by the ACLU and everybody else? I said: "Everybody has to take a piece of the poison, and as long as I am your councilman I will see to it that everybody gets it."

Once I presented the plan that said they were going to put scattered-site housing in every single area of the county—every county district—and I got my colleagues to agree to one in each district, they went along with it, and they voted for me.

But do you know what the housing people did then? They did not want to talk about that. You all went back to your demographic figures and all these rules and regulations instead of a commonsense approach saying 25 housing units in every place. They said: "Well, it does not meet the transportation pattern, we do not have the local bus routes, we do not have this, we are going to do that."

Then I said: "In addition to that, do you know what we do when we put the housing in here? We compensate the school district for the increase it is going to bear." "Oh, no, we can't do that," they said. "That is the local district's problem."

My point is, if we use a little bit of sense about these things we can make them, but we do not have any constituency, Professor, it has gone. We will get it back.

Anyway, unless we abandon the part that does not make any sense, we are not going to get them to agree to the parts that make a lot of sense. I agree, where there is a constitutional violation and it is clear, you need to do something, and you need a remedy. That is why I bothered to ask Mr. Arnold, the Senator, whether he agreed to that. That is why I have always asked every one of them when they were up here. I have every one of them on record.

Everybody has testified here, whether it be Mr. Arnold or Mr. Venema when he was here—I said: "If it was clear that it was intended to segregate, would you not support anything, including busing?" "Oh yes, we have got to do it," they say.

Let us get the folks who may have a different philosophic view than we, let us get them on the record and on the line. We were just starting to do that. But every time Joe Biden or Eagleton or anybody else who has pretty good credentials stands up and says something against busing, we get slammed. They say we have abandoned the black community, and the liberals, and this and that. And that is a bunch of mularky.

And so nobody talks to anybody now. So you have a man who is a fine guy but philosophically I have great disagreement with—Mr. Hatch—on the one side, and you have got Senator Kennedy on the other, and never the twain shall meet. So you give the people one of two alternatives, and they are taking a shot at the other one. They know one does not work, so they are going to try the other. That is what I think.

Probably my not being at the Lefever meeting will enhance the prospect of him being defeated. I do not know. But I really thank you for your time. I am going to continue to pick your brain, if I can, as we go along in this thing.

As my dear old friend, the Republican conservative Henry Fulsom used to say: "Politics is the art of the practical. Unfortunately, we are not very practical."

Mr. **Orfield**. Before we finish, Senator, perhaps I could just make one brief remark. In earlier testimony today, there was a claim that the courts in St. Louis are a designing a mandatory plan.

I am the court-appointed expert there, and I know neither judge has been designing a mandatory plan, nor have the suburbs been joined in the case at this stage. They are trying to talk about voluntary approaches and I would just like to make the record straight on that.

Senator **Biden**. As I said, there are several questions, including some that I have. I wanted to know your view about some of the voluntary incentive plans. The most innovative one—and I do not know how reasonable it is—is the college tuition plan. I would like your views on that. We will submit them for the record.

[The material supplied follows:]

I have recommended to the court in St. Louis that there be a trial of the Justice Department's proposal that students voluntarily transferring across the city-suburban boundary line to increase desegregation be given a half-year of free college tuition in a state college for each year in a desegregated school. An outline of possible procedures for testing the impact of this approach on a small scale will be submitted to the court by researchers from Johns Hopkins University in July, 1981.

Senator **Biden**. I thank you for your indulgence in hearing me go on for the last 10 to 15 minutes, but I say it because I respect you very much, and I know that you represent a community of intellectuals in this country that maybe has not been as exposed as much.

There is a middle position. They are not all one way or the other. They are not all, "hang 'em," or, "rehabilitate 'em." We are not all saying: "Busing is good and all the programs that go with it," or: "Busing is bad, and, by the way, let's get rid of the programs." There are some folks who are swimming in between and not getting very far, like me. Thank you.

Mr. **Orfield**. Thank you, Mr. Chairman.

Senator **Biden**. The hearing is adjourned.

[Additional material subsequently submitted follows:]

Gallup Poll—Whites, Blacks Split On Busing Issue

(By George Gallup)

PRINCETON, N.J.—The Reagan administration's position on the key domestic issue—busing to achieve racial balance in the schools—is in line with the views of the majority of white Americans. The latest Gallup survey shows opinion among whites 4-to-1 in opposition to busing.

Blacks, however, are 2-to-1 in favor of this means of achieving a better racial balance in the schools.

While the majority of whites oppose busing, factors other than racial prejudice appear to underlie much of their opposition, as determined by a series of questions on attitudes toward racially-mixed schools.

For example, even among the 45 percent of white parents who say they have NO OBJECTIONS to their children attending racially-integrated schools, eight in 10 (78 percent) are opposed to busing as a means of achieving racial balance. Clearly, much opposition can be explained in terms of objections to the distance children have to be bused and to other factors.

Since 1964, when the Supreme Court ruling went into effect, the Court has been involved in more than 500 school desegregation cases.

On Nov. 17, the Senate passed a bill that would have prohibited the Justice Department from intervening in school desegregation cases involving busing. The Senate bill—which was never approved—would not have actually outlawed busing but by requiring private parties to bring busing cases to court, it would have made it difficult and impractical for pro-busing groups to use busing as an effective anti-discrimination tool.

Following is the question asked to determine the public's attitudes toward busing:

"Do you favor or oppose busing children to achieve a better racial balance in the schools?"

Aside from basic dichotomy in the views of whites and blacks, majority opposition toward busing is found in all key demographic groups. However, comparatively more support for busing is shown by young adults and Democrats.

Following are the findings in tabular form:

BUSING FOR BETTER RACIAL BALANCE

[In percent]

	Favor	Oppose	No opinion
National	22	72	6
Whites	17	78	5
Blacks	60	30	10
East	23	69	8
Midwest	18	76	6
South	25	71	4
West	24	70	6
College education	21	75	4
High school	22	72	6
Grade school	27	65	8
Under 30 years	31	62	7
30–49 years	21	75	4
50 and older	18	76	6
Republicans	15	81	4
Democrats	28	64	8
Independents	18	78	4

Following are the questions asked white parents to determine their attitudes toward sending their children to integrated schools:

"Would you, yourself, have any objection to sending your children to a school where a few of the children are black? Where half are black? Where more than half of the children are black?"

The results show only 5 percent of white parents would object to sending their children to a school where only a few of their fellow students were black. The figure rises to 23 percent where one-half the students are black and to 55 percent where more than half are black. These figures are similar in racial tolerance from a 1963 Gallup study.

Here are the results:

INTEGRATED SCHOOLS

[In percent]

	All white parents	South	Rest of United States
Would object to sending children to schools where:			
A few children are black	5	5	5
One-half are black	23	27	22
More than one-half are black	55	66	51
No objections	45	34	49

The findings reported today are based on in-person interviews with 1,549 adults, 18 and older, of whom 1,381 were white and 149 were black. The interviews were conducted in more than 300 scientifically-selected localities across the nation during the period Dec. 5-8, 1980.

For results based on the full sample, one can say with 95 percent confidence that the error attributable to sampling and other random effects could be three percentage points in either direction. For results based on the white subsample, a 4 percent margin of error should be allowed, for results based on the black subsample, a 10 percent margin of error should be allowed.

LOUIS HARRIS AND ASSOCIATES, INC.—A STUDY OF ATTITUDES TOWARD RACIAL AND RELIGIOUS MINORITIES AND TOWARD WOMEN

A Louis Harris poll for the National Conference of Christians and Jews found that whites are far more tolerant of integration than they were in 1963, less given to racial stereotyping and ready to accept wide-ranging affirmative-action programs. Thirty-five percent of the whites surveyed said they favored "full racial integration," and another 42 percent favored integration in "some areas." Only 14 percent of whites said they would be upset if blacks moved into their neighborhoods, compared with 33 percent in 1963; 54 percent said they would not mind at all.

On school busing for racial integration 85 percent of whites still oppose busing (as do 43 percent of blacks) but the study found that 56 percent of white parents whose children have been bused consider the experience "very satisfactory." And 39 percent of white parents said there were no complaints from their children. "The irony of busing to achieve racial balance," the study concludes, "is that rarely has there been a case where so many have been opposed to an idea which appears not to work badly at all when put into practice."

Of course, the one issue which has stirred up the most visible controversy in race relations over the past decade centers on public education, particularly the enflamed question of busing children to achieve racial balance in the schools. On the surface, support for such busing has simply not caught on in America. By a narrow 43-42 percent, a plurality of blacks now oppose busing, a turnaround from the 50-30 percent margin they favored it by back in 1963. Among whites, an overwhelming 85-9 percent majority also oppose busing, not significantly different from the consistent opposition of whites to busing since the idea was first launched in the 1960's.

However, the evidence from those parents whose children have been bused is not nearly as negative or the predisposition to oppose this solution to integration in education would indicate. Among blacks, 35 percent nationwide report that a child in their family has been bused. In the South, fully 46 percent of black families have had this busing experience. Among whites, a much lower 10 percent report children in their families have been bused.

Yet, when both blacks and whites whose children have been the objects of the busing experiment are asked how it all worked out, the results do not indicate widespread outrage or trouble:

REACTION OF BLACK AND WHITE PARENTS WHOSE CHILDREN HAVE BEEN BUSED FOR RACIAL BALANCE (BASE: CHILDREN HAVE BEEN BUSED)

Question. How did the busing of children in your family to go to school with white/black children work out—very satisfactory, only partly satisfactory, or not satisfactory?

[In percent]

	Blacks	Whites
Very satisfactory	63	56
Partly satisfactory	25	23
Not satisfactory	8	16
Not sure	4	5

Basically, roughly 6 in 10 families report a "very satisfactory" experience for their children in their busing to achieve racial balance, with 8 in 10 expressing a positive reaction overall. Put another way, no more than 8 percent of the blacks and 16 percent of the whites feel that having their children bused has not been a satisfactory experience.

As the following table indicates, both blacks and whites report remarkably parallel reasons for their views about the busing experiment:

REASONS BLACKS AND WHITES GIVE FOR FINDING THEIR BUSING EXPERIENCE SATISFACTORY OR NOT (BASE: CHILDREN HAVE BEEN BUSED)

Question. Why do you feel that way about the busing of children in your family?

[In percent]

	Blacks	Whites
Why satisfactory:		
No problems, no complaints from children	28	39
Children learn more, better school	19	4
Children learn to live with each other	16	16
No fighting or trouble	9	8
Children happy	6	2
Convenient for parent, bus picks right up	5	3
Have to be bused under the law	3	3
No problems with teachers/drivers	3	3
Parents of both races working together	1	4
Why not satisfactory:		
Distance too far	8	12
Been trouble, fighting	8	9
Bus late, overcrowded	5	3
Some students unhappy	3	3
Have school nearby, foolish to go distance	1	3
Just don't like the idea	1	6
Should leave blacks alone	1	1

Note: Some people volunteered more than one answer, so colums add to more than 100 percent.

The litany of no real complaints from the children who have been bused, the ability of white and black children to get along, and the relatively small minority who report fighting and trouble all add up to a quite different picture of how busing has in fact worked out than one might have drawn from the confrontation cases which have received so much attention in the media.

OBSERVATION

The irony of busing to achieve racial balance is that rarely has there been a case where so many have been opposed to an idea, which appears not to work badly at all when put into practice, at least from the testimony of families who have lived through the experience. While it is obvious that there are whites who are still emotionally disturbed at the whole idea, there are incidents of outbreaks of trouble, there are whites who think the distances are too far to travel, and people would never have opted for the experiment in the first place; nontheless the almost automatic claim that "busing is a disaster" simply will not hold in the face of the facts from this study. And, among blacks, there is a clear sense that their children are going to better schools, which was the basic intent of the courts in ordering busing in the first place.

The bedrock reason given for having black and white children go to school together is that black children would do better in school if they attend integrated schools. When asked, blacks feel that black children would do better in such schools by a margin of 62-7 percent, with 25 percent saying they would do about the same as they do now. Among whites, 49 percent acknowledge that black children would do better in integrated schools, only 11 percent worse, and 32 percent no real difference. Significantly, the number of whites who feel that blacks would do better going to school with whites has risen from 28 percent to 49 percent since 1966. Thus, 71 percent of all blacks say they would either like to see their children go to school with whites or that they already do (13 percent say it is happening now). This 71 percent number has not changed in 15 years (70 percent in 1963).

Among whites, the problem is cast in somewhat different terms. The charge has been made repeatedly that white children would suffer if they attended school with blacks, that the black children would hold back the whites. However, when asked about this, by 67-26 percent, a solid majority of whites deny their children would suffer. The number who worry about this problem among white parents has gone up from 19 percent to 26 percent since 1963, but the two-thirds majority who feel this is not the case has not changed much.

When asked directly if they would like to see the children in their family go to school with blacks, only 14 percent of whites object. . . .

RESEARCH, POLITICS AND THE ANTIBUSING DEBATE

By
GARY ORFIELD

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RESEARCH, POLITICS AND THE ANTIBUSING DEBATE

GARY ORFIELD*

INTRODUCTION

A generation of national struggle over school desegregation policy has shown that the only thing that is worse for social science than being ignored altogether is being taken too seriously too soon. The original *Brown* case went to the Supreme Court accompanied by a brief by dozens of prominent social scientists affirming the damaging character of segregation. The South presented its own social science evidence against desegregation.[1] Although the Supreme Court made only passing reference to social science in its 1954 decision[2] and none at all in the school decisions that followed, social scientists claimed major credit for the victory, and Southern opponents based much of their criticism on the claim that the Court had abandoned its proper role by considering speculative academic social science research in place of law.

The controversy only deepened in the 1970s when some social scientists began to attack the urban school desegregation orders of the federal courts. Articles claiming that the unpopular busing policy produced no academic gains for black children[3] and accelerated white abandonment of city public schools[4] received extraordinary national attention from the press and policymakers. Judges were confronted with social scientists testifying for diametrically opposed policies, and bitterness among some leading researchers became notorious.[5] Some school districts even funded large-scale social science research to prove that desegregation should not be implemented.[6] School districts and civil rights advocates have each developed a coterie of social scientists who regularly appear as witnesses and consultants in school desegregation litigation.

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* Associate Professor, Political Science Dept., University of Illinois. After this article was drafted, the author had the opportunity to try out some of the ideas proposed here while serving as chairman of the Illinois Office of Education's Technical Assistance Committee on the Chicago Desegregation Plan and as a court-appointed expert in the Los Angeles school desegregation case.

[1] ARGUMENT 60-61 (L. Friedman ed. 1969).

[2] Brown v. Board of Educ., 347 U.S. 483, 494 at n.11 (1954).

[3] *See, e.g.*, Armor, *The Evidence on Busing*, 28 PUB. INTEREST 90 (1972).

[4] *See, e.g.*, J. COLEMAN, S. KELLY & J. MOORE, TRENDS IN SCHOOL INTEGRATION, 1968-73 (Aug. 1978) (Urban Institute Paper No. 722-03-01) [hereinafter cited as J. COLEMAN].

[5] *See* Pettigrew, Useem, Normand & Smith, *Busing: A Review of "The Evidence,"* 30 PUB. INTEREST 88 (1973); Armor, *The Double Double Standard: a Reply*, 30 PUB. INTEREST 119 (1973).

[6] *See* the discussion of the Los Angeles and St. Louis studies, *infra*.

This public attention has been a new experience for social scientists who have traditionally received little notoriety compared to celebrities in science economics, law, and other professions. Authors of relatively modest articles on school busing have sometimes found themselves at the center of a national media barrage and deluged with invitations to make cosmic statements on the future of cities they have never visited.

The attention, however, has served to highlight and even intensify internal divisions within the scholarly community, both on methodology and analytic assumptions. Moreover, a series of emotional disagreements has surfaced about the role scholars should play in public disputes about the future of American race relations. These problems have been magnified by mass media coverage, which has often selectively and inaccurately reported the scholarly disputes, and hopelessly muddled the difference between the empirical findings of a given scholar and the political judgments he may reach as a citizen. Of course, scholars themselves sometimes blur this distinction.

The involvement of scholars in school desegregation cases has created deep fissures within the universities, and between the academic world and civil rights leaders, public officials, and antibusing groups. Although most school desegregation research is motivated by a desire to contribute to a better understanding of racial problems and wise public policy, the transmission of research findings has proved to be a difficult and even perilous process. The effort has real costs, and there are serious questions about whether there have been any compensating gains.

The fact remains that there is no satisfactory alternative to using the best available social science data in developing remedies for segregation. Although the social sciences may not always be relevant in determining whether city school officials have violated constitutional requirements, they provide important insights into the kind of school desegregation plan that is likely to work best, which legal analysis alone cannot do. Although social science may not always have the final answers on many issues, in a number of cases the research findings are sufficiently clear and consistent to show that a particular approach is more likely to work than another. The alternative to using social science data and findings is to rely on the hunches and common sense of judges and lawyers about very complex issues of urban demography, educational policy, and other fields in which they usually have no professional training and little knowledge of what has happened in other cities across the nation.

There are a number of obstacles, however, to the effective use of social science research. This article examines several aspects of the problem:

1. the selective perceptions of the research by the media and policymakers;

2. the way social science concepts reshape the character of the desegregation debate;
3. the deepening distrust of social scientists by civil rights leaders;
4. the contradictions between some research findings and the notions about social reality embodied in current desegregation plans.

After examining these obstacles and problems, the article concludes with a discussion of the needs of judges, administrators, and elected officials who must make decisions and devise plans regardless of the academic conflicts and confusions that persist in some areas of desegregation research.

I

SELECTIVE PERCEPTIONS OF THE RESEARCH: THE ROLE OF THE MEDIA

Most social science research is simply irrelevant to decisionmakers because they do not know it exists. Generally, research appears only in obscure scholarly journals or in mimeographed reports to federal agencies or private foundations. Under such circumstances, the only possible impact is indirect: the research can influence the work of other scholars in the field and of technically-skilled journalists. Eventually it may be incorporated in more widely read works.

A social science study may become highly visible either because of the political clout of its sponsor or because of the apparently novel or newsworthy character of its principal findings. Occasionally the reputation of the investigator may also be responsible for its receiving public attention. Some of the most influential research studies have been sponsored by government agencies and a handful of the largest foundations, which actively have used the results to promote particular policies.

The federal government has sponsored only one large-scale study of school desegregation, the 1966 report *Equality of Educational Opportunity* (the *Coleman Report*).[7] This study, produced by a team of academic researchers working closely with the United States Office of Education, has helped to shape both the research agenda and the debate over desegregation policy. Innumerable studies have reanalyzed and reinterpreted the *Coleman* data. The U.S. Commission on Civil Rights drew heavily on the data for its influential 1967 report, *Racial Isolation in the Public Schools*.[8]

Though the *Coleman Report* initially received little media attention, it had a profound effect on academic thinking about desegregation. By the late 1960s, its basic conclusions were broadly accepted by experts and had begun to influence policy. Although some critics pointed to significant methodological problems in the report,[9] it was such an advance over previous research that these questions were not seriously examined for some time.

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[7] EQUALITY OF EDUCATIONAL OPPORTUNITY (1966) [hereinafter cited as the COLEMAN REPORT].

[8] 2 U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967).

The major policy conclusions of the *Coleman Report* were:

1. School desegregation produces an educational gain for black children not because of contact with whites but because it is an indirect way to put many poor children from families with weak educational backgrounds in classes where the pace and the expectations are set by a majority of children from more privileged backgrounds;
2. The positive impact is relatively small in any case, still leaving a substantial achievement gap between white and minority children;
3. Schools are more important for poor children, while the home background is more decisive for white middle-class children; desegregation has no impact on the achievement of white middle-class children;
4. Compensatory education is probably a futile strategy, since the level of spending on schools is not significantly related to the achievement of children.

The *Coleman Report* had surprisingly little influence on school desegregation litigation. Although *Hobson v. Hansen*,[10] one of the first urban school desegregation decisions, drew on the report, the precedent-setting urban school desegregation cases were based on more traditional legal reasoning. The Supreme Court's rulings on citywide desegregation in the mid-seventies made no reference to sociological data.[11] The research findings of the *Coleman Report*, however, provided a rationale for the arguments of desegregation supporters opposing the wave of angry political criticism triggered by the systemwide busing plans approved by the Supreme Court. When Congress first considered legislation restraining the courts, for example, Professor Coleman was an important spokesman against the drastic restrictions being considered.[12] Other scholars testifying before the widely publicized Mondale Committee desegregation hearings also cited the *Coleman Report*.[13] The U.S. Commission on Civil Rights' *Racial Isolation in the Public Schools*[14] report was widely circulated among minority groups and educators. Although the *Coleman Report* provided desegregation supporters with some useful ammunition, its major premise—that class rather than race was the key factor—never penetrated the public discussion.

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[9] *See, e.g.*, Bowles & Levin, *The Deteminants of Scholastic Achievement—An Appraisal of Some Recent Evidence*, 3 J. OF HUMAN RESOURCES 3 (1968).

[10] Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, Smuch v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[11] *See* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

Ironically, the *Coleman Report* may have had more impact on legal challenges to inequitable school finance systems than to segregated school systems. In its 1973 decision upholding the constitutionality of the system by which Texas distributed school funds, the Supreme Court cited C. JENCKS, J. COLEMAN, E. CAMPBELL, C. HOBSON, J. MCPARTLAND, A. MOOD, F. WEINFELD & R. YORK, INEQUALITY (1972), one of the most widely publicized interpretations of the *Coleman* data, in support of its decision that federal courts should not interfere in state school financing schemes. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 43 n.86 (1973).

The second study to become nationally visible was of a very different character and had a decidedly negative impact on urban school desegregation efforts. David Armor's article, "The Evidence on Busing," which was published in mid-1972, instantly made the young Harvard researcher one of the most publicized academics in the nation.[15] In his article, Armor claimed that the Supreme Court had favored integration initially because of the belief that it would improve the education of black children.[16] Armor, however, concluded on the basis of his analysis of several projects undertaken by other researchers, and the results obtained in his own study of a small, voluntary plan in effect in metropolitan Boston, that the Court was wrong. Busing plans, he said, were ineffective or even counterproductive, regardless of whether the objective was to improve the achievement levels of blacks, the educational or occupational aspiration levels of blacks, or relations between the races.

Coming in the midst of an election-year struggle over antibusing legislation, at a time when the courts were considering plans for busing between central cities and their suburbs,[17] this recantation by a Harvard professor who had once worked for the U.S. Commission on Civil Rights received spectacular media coverage. *Public Interest*, the journal which published the article took the unusual step of holding a prepublication press conference, resulting in the article receiving headline coverage in the *Washington Post* and other major newspapers. Within days, the article was cited on the floor of Congress, in editorials, and in political speeches as scientific evidence that busing was a worthless concept. Armor himself became an important witness at congressional hearings and in a number of school cases.[18] School districts sought, unsuccessfully, to use his testimony to convince judges not to order busing.[19]

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[12] *E.g.*, *Equal Educational Opportunity, Pt. 1A: Hearings Before Senate Select Comm. on Equal Educational Opportunity*, 91st Cong., 2d Sess. 87-134 (April 21, 1970).

[13] Hearings and reports of the Mondale Committee (The Senate Select Comm. on Equal Educational Opportunity) during the 1970-72 period contain numerous references to the *Coleman Report*.

[14] 2 U.S. COMM'N ON CIVIL RIGHTS, *supra* note 8.

[15] Armor, *supra* note 3.

[16] *Id.* at 91.

[17] *See, e.g.*, Bradley v. School Board, 338 F. Supp. 67 (E.D. Va.), *rev'd*, 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided Court*, 412 U.S. 92 (1973) (the Richmond case); Bradley v. Milliken, (E.D. Mich. Mar. 28, 1972) (unreported findings of fact and conclusions of law), *modified*, 345 F. Supp. 914, *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd and remanded*, 418 U.S. 717 (1974) (the Detroit case).

Armor's greatest impact was not on the academic world but on policymakers and the mass media. Although his conclusions were hotly disputed by other researchers, they entered the national repository of accepted wisdom. Even those who did not know Armor's name and had never read his article often cited its basic conclusion as if it were a scientific fact—something that "research has shown." Rep. Podell (D-N.Y.), for instance, saw it as a reason to support President Nixon's antibusing bill: "There is no satisfactory evidence that busing aids the educational process. Most recent educational research shows that in many cases busing hurts educational progress."[20] Another Northern Democrat, Rep. Veysey of Ohio, cited "reliable research studies like the Armor report" as proof of busing's "adverse effect on the education children receive."[21]

The concern was not limited to Congress but was shared by the public at large. Media coverage indicating that there was scientific proof of educational damage may well have reinforced and heightened concern among parents. For example, a national survey conducted during the 1972 election period showed that 27 percent of the public believed that test scores of white children had "fallen sharply in desegregated schools." Only about one-third of the public recognized that this claim was false.[22] Even the leading social science critics of busing had made no such charge—Armor, for example, had found no adverse impact on white students from desegregation.[23]

Scholarly rebuttals of Armor's analysis received far less attention from the media and policymakers. While there was significant coverage of the bitterness and backbiting within the Harvard faculty over the issue, the response by Thomas Pettigrew and several other scholars[24] received far less substantive media coverage and almost no attention in Congress. The timing of Armor's article and its congruence with an emerging white consensus against busing gave his brief and controversial treatment of the data a powerful and lasting impact.

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[18] For example, Armor was the principal social science witness in support of President Nixon's antibusing legislation in 1972. *Equal Educational Opportunities Act of 1972: Hearings before Senate Comm. on Labor and Public Welfare, Subcomm. on Education*, 92d Cong., 2d Sess. 1194-204 (Sept. 25, 1972) [hereinafter cited as *Armor testimony*].

[19] *See, e.g.*, Northcross v. Board of Educ., 466 F.2d 890, 894 & n.4 (6th Cir. 1972).

[20] 118 CONG. REC. 28864 (1972).

[21] *Id.*

[22] U.S. Comm. on Civil Rights, Public Knowledge and Busing Opposition (March 11, 1973) (processed) (based on a survey conducted by Opinion Research Corporation).

[23] *Armor testimony*, *supra* note 18, at 1196.

[24] Pettigrew, Useem, Normand, & Smith, *supra* note 5.

School desegregation research again made headlines in early 1975 when Professor James Coleman delivered a paper at the annual meeting of the American Educational Research Association on some preliminary results of an analysis of the causes of "white flight." Coleman and his colleagues found a statistical relationship between the implementation of school desegregation plans and the rate of decline in white enrollment in the twenty-two largest central city school districts.[25] This paper, a highly tentative interpretation, which included a number of speculative conclusions unrelated to the research, began to influence national policy even before it was published later that year. The impact of the paper increased when Coleman gave a series of wide-ranging interviews, which were carried in major newspapers and on television.[26] Because of his academic stature and his previous notoriety from the *Coleman Report*, Coleman's comments and speculations were treated as if they were proven research findings. Although Coleman soon found himself involved in an angry scholarly debate over his research methods and policy conclusions,[27] he began to file depositions in pending court cases, including the Boston and Louisville cases, urging restraint on busing to avoid massive white flight.[28] More importantly, Coleman's views were widely accepted by members of Congress, including those who had once been supporters of school desegregation,[29] and newspapers across the country saw the study as the rejection of busing by one of its most important academic exponents.

A thorough examination of the treatment of the Coleman study by the most widely-read newspapers and weekly news magazines documented the highly selective media perception of the scholarly dispute.[30] The average publication carried three and one-half stories on the white flight issue as interpreted by Coleman. Although most other scholars who spoke out on the issue disagreed with either Coleman's methodology or his policy conclusions,[31] and Coleman himself made major modifications in successive drafts of his paper, 85 percent of the news space devoted to the question uncritically reported Coleman's initial assertions. More than two-fifths of the publications never carried a story critical of the Coleman study, and only about one-eighth of the articles reported any of the specific questions raised about Coleman's research.[32] It is not surprising that Coleman's findings entered public debate as a proven fact rather than as a tentative hypothesis.

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[25] J. COLEMAN, *supra* note 4, at 39.

[26] *See, e.g.*, *Busing Backfired*, Nat'l Observer, June 7, 1975, at 1, col. 1.

[27] *See, e.g.*, SYMPOSIUM ON SCHOOL DESEGREGATION AND WHITE FLIGHT (1975) (Sponsored by the Notre Dame Center for Civil Rights and the Center for National Policy Review).

[28] *See, e.g.*, Morgan v. Kerrigan, 530 F.2d 401, 420 n.29 (1st Cir. 1976).

[29] Senators Joseph Biden (D-Del.) and Thomas Eagleton (D-Mo.), for example, repeatedly cited the white flight argument to justify their 1977 antibusing legislation. *See, e.g.*, S. 1132, 95th Cong., 1st Sess. (1977). *See also Eagleton on Busing*, St. Louis Post-Dispatch, July 24, 1977, § B, at 2, col. 4.

[30] R. Weigel & J. Pappas, Social Science and the Media: Press Coverage of the "White Flight" Controversy, at 8-10 (1977) (unpublished). *See also* Taylor, Benjes, & Wright, *School Desegregation and White Flight: The Role of the Courts*, in SYMPOSIUM ON SCHOOL DESEGREGATION AND WHITE FLIGHT, *supra* note 27, at 69.

[31] Professors Weigel and Pappas examined 20 leading publications over a six-month period in 1975.

Media treatment of new pronouncements by Coleman and Armor in 1978 continued the old pattern. An article by Coleman, based on a speech he had given five months earlier[33] and containing neither new research nor new opinions, was published by the *Chicago Tribune*.[34] It immediately became the focus of widespread press coverage[35] and was cited as "new" evidence by editorials questioning extensive school desegregation plans.[36] The *Washington Post*'s story on Coleman's views[37] was repeatedly cited in a Senate debate on an antibusing issue to indicate that Coleman had new research findings that supported the antibusing position.[38]

The publicity given to an unpublished study on white flight by David Armor was even more remarkable. A draft article on white flight Armor had prepared for delivery at a sociological meeting received major coverage in the *Los Angeles Times*,[39] in many other papers through the Associated Press wire service, on the front page of the *Washington Post*,[40] and in a full-page story in *Time* magazine.[41] The *Time* coverage was highly favorable,[42] criticizing academics who had "kept busy stomping all over Coleman's findings" on white flight. This new report by a "Harvard-trained" sociologist, the magazine announced, had produced "remarkably consistent" findings. Each of the articles contained at least passing reference to some of the serious criticisms of Armor's work.[43] Nonetheless, the coverage was massive and wholly out of proportion with that given to other published and unpublished studies of the subject. Selective perception was again in operation.

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[32] R. Weigel & J. Pappas, *supra* note 30, at 8-10.

[33] The speech was given in April at Henry Ford Community College in Dearborn, Michigan and was basically a statement of Coleman's personal views on the value of integration, primarily in improving the achievement of black children.

[34] James S. Coleman, *Can We Integrate Our Public Schools Without Busing?* Chi. Tribune, Sept. 17, 1978, § 2 (Perspective/Business), at 1, 5.

[35] *See, e.g.*, Lawrence Feinberg, *Integration Benefits Discounted*, Washington Post, Sept. 18, 1978, § A, at 1, 5. The Coleman article was reprinted in the *Chicago Sun-Times* a little over a week after it had appeared in the Tribune. James S. Coleman, *False Beliefs About School Integration*, Chi. Sun-Times, Sept. 26, 1978, at 39.

[36] Chi. Sun-Times, *New Look at Integration*, Sept. 26, 1978, at 41; *The Buses Roll*, Wall St. J., Oct. 4, 1978, at 18.

[37] Note 35 *supra*. Twenty-four members of the National Review Panel for School Desegregation Research protested inaccuracies in the news coverage and the failure to report other research findings. *See* National Review Panel for Desegregation Research, Press Release, Desegregation Has Worked, Expert Panel Says (September 29, 1978). In response, the *Chicago Tribune* published an article by Robert Crain and Rita Mahard, summarizing their recent research on the academic effects of school desegregation. Robert L. Crain and Rita E. Mahard, How Integration Can Help Black Students Achieve, Chi. Tribune, Oct. 8, 1978, § 2 (Perspective/Business) at 1. *See* Crain & Mahard, *Desegregation and Black Achievement: A Review of the Research*, 42 LAW & CONTEMP. PROB., Summer 1978, at 17.

The *Washington Post* initially responded to the protest by running two paragraphs on an inside page at the conclusion of a story about the extent to which blacks are attaining positions on college faculties. Auerbach, *Black College Staff Parity Seen Taking at Least 45 Years*, Wash. Post, Sept. 29, 1978, § A, at 7. Only after repeated requests did it run a response to the Coleman coverage on its Op-Ed page on October 14, 1978. Willis D. Hawley and Betsy Levin, "*Wayward*" *Coverage of School Desegregation*, Wash. Post, Oct. 14, 1978, § A, at 17.

[38] 124 CONG. REC. S16300-16302 (daily ed. Sept. 27, 1978).

[39] Oliver, *Forced Busing Spurs Racial Isolation*, Special from *Los Angeles Times*, in *Chicago Sun-Times*, August 23, 1978.

[40] Feinberg, *Prince George's "White Flight" Seen Linked to Busing Order*, Wash. Post, Sept. 25, 1978, § A, at 1, 7.

It would be overstating the case, of course, to claim that these few prominently discussed studies changed national policy. On the contrary, they may have become so prominent because they reflected, and provided a rationale for, a change in national policy that was already underway. To the extent that university researchers are thought to be dispassionate scientists who are generally committed to objective truth, this selective perception of university-related research findings may have helped to legitimize and camouflage a general social and political movement away from the integrationist policies of the sixties.

In view of the controversy surrounding desegregation policies and the extraordinary public attention given to some of the extant research studies, it is puzzling that the 1966 *Coleman Report* remains the only national assessment of the effect of desegregation. Experts in the field, including Coleman himself, have long conceded that the 1966 study was limited to a narrow range of issues, hastily studied during a period before any major city had desegregated.[44] Although the need for more sophisticated information concerning the desegregation process over time has been apparent for years, there has been no major federal or private effort to find out what is actually happening in desegregated schools.

Neither side in the national debate over urban school desegregation has pressed for basic research on this issue. One reason may be that both sides are so certain of the correctness of their positions that proof seems unnecessary or even irrelevant. Although both the Nixon and Ford Administrations consistently asserted that busing was damaging to education,[45] and congressional debates were filled with similar claims,[46] leading opponents of school desegregation have never called for a major research effort. In addition, when the principal governmental proponent of urban school desegregation, the U.S. Commission on Civil Rights, did launch a research enterprise, the project was jettisoned before any data could be collected. The development of a comprehensive multi-year research strategy was funded by the Commission, but after the report was released,[47] it was quietly shelved, in part because many minority leaders had concluded that social scientists were hostile to desegregation.[48]

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[41] *Forced Busing and White Flight*, TIME, September 25, 1978, at 78.

[42] *Id.* The *Time* report even adopted the "forced busing" rhetoric of desegregation opponents:

> "[T]here is now considerable academic consensus that in large cities a significant linkage exists between white flight and forced busing. The fact that sociologists show signs of catching up with everybody else's common-sense observation should be reassuring."

During this same period a number of articles and reports on white flight by prominent scholars including Reynolds Farley, Christine Rossell and others received very little national press attention. *See, e.g.*, C. Rossell, Assessing the Unintended Impacts of Public Policy: School Desegregation and Resegregation (1978) (report prepared for the National Institute of Education); Rossell, *School Desegregation and Community Social Change*, 42 LAW & CONTEMP. PROB., Summer 1978, at 133.

[43] The *Time* article noted that Armor's treatment of demographic factors and his theory of anticipatory white flight had been critized. *Supra* note 41.

[44] *See, e.g.*, ON EQUITY OF EDUCATIONAL OPPORTUNITY (F. Mosteller & D.P. Moynihan eds. 1972).

More limited, but nonetheless significant, federal evaluations also have been largely ignored, though they contain positive findings about the effects of desegregation, a much more complex view of the changes that occur within schools that undergo desegregation, and important ideas about improving the desegregation process. A series of reports by the National Opinion Research Center, the Educational Testing Service, and the Systems Development Corporation analyzed changes over a period of years in a number of individual classrooms and schools that have been desegregated. The findings of these exploratory studies all point toward broadly similar requirements for successful desegregation: effective leadership by the principal, staff training programs, rules that students see as fair, and explicit efforts to teach students about historical and contemporary American racial and ethnic relationships.[49] Though these studies were substantial research undertakings and produced significant findings, most were never discussed by the media and never entered the policy debate. Many of those undertaken for HEW were not even published.

Even a very brief review of a decade of scholarly investigations of the effects of school desegregation demonstrates that there is little relationship between the merit of a study and its visibility and influence on policy. Policymakers share the normal human tendency to heed research findings that agree with their perceptions. With the exception of a few specialized journalists, the press continues to cover researchers "not for saying what is true but for saying what is startling."[50]

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[45] Statement About Desegregation of Elementary and Secondary Schools, 1970 Pub. Papers 304, 307.

[46] Notes 20-21 *supra* & accompanying text.

[47] R. Crain, D. Armor, F. Christen, N. King, M. McLaughlin, G. Sumner, M. Thomas, & J. Vanecko, Design for a National Longitudinal Study of School Desegregation (Rand No. 1516, Sept. 1974).

[48] *See* pp. [14-15] *infra*.

[49] 1-2 National Opinion Research Center, Southern Schools: An Evaluation of the Emergency School Assistance Program and of School Desegregation (1973); G. Forehand, M. Ragosta, & D. Rock, Conditions and Processes of Effective School Desegregation (1976) (Final Report of research undertaken by contract with the Dept. of Health, Educ., & Welfare); System Development Corp., The Third Year of Emergency School Aid Act (ESAA) Implementation (1977) (Report of Research undertaken by contract with the Office of Education). *See also* Orfield, *How to Make Desegregation Work: The Adaptation of Schools to their Newly-Integrated Student Bodies*, 39 Law & Contemp. Prob., Spring 1975, at 314.

II

TRANSFORMATION OF THE DESEGREGATION DEBATE: RESEARCH AS A SOURCE OF NEW PARADIGMS

Though research on school desegregation is still at a relatively primitive stage, social science concepts from the academic community have helped transform the way we speak about and view the desegregation process. In *Brown v. Board of Education*,[51] the Supreme Court devoted only one footnote to social science research.[52] Its decision spoke not of test scores but of the damage to the "hearts and minds" of black children forced to attend segregated schools.[53] And since 1954, the school desegregation decisions have not referred to social science research.[54] The task, as the Court has seen it, is to eliminate the evil of officially imposed segregation of black and Hispanic children. The appropriate remedy for this constitutional violation is desegregation.[55]

Confronted with the problem of measuring whether desegregation "worked," social scientists began to reshape the issue, often without any conscious intent. School districts and governmental agencies naturally turned to educational researchers for immediate answers and educational researchers naturally took up their most frequently used instruments, standardized achievement tests. Though such tests were themselves highly controversial, the technology of testing was highly developed, familiar, and easy to use. These tests were usually administered in the fall and the spring of a single school year, often the first and most difficult year of an unplanned transition to desegregation.

The choice of achievement test measures set a standard for success and for "failure" of desegregation. It rested on an assumption not found in the *Brown* case—that desegregation could only be justified on the basis of strong educational gains that presumably would arise merely by placing minority and white children in the same classroom. Armor took this one step further, by establishing his own standard—the elimination of the entire yearly increase in the gap between average white and black achievement scores.[56] Where this standard—a standard that no educational reform had achieved—was not attained, desegregation was deemed a failure. Use of this unrealistically high standard led to the conclusion that busing—indeed, desegregation in general—had failed. The Supreme Court, Armor determined, had been wrong.

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[50] Crain, *Why Academic Research Fails To Be Useful*, 84 SCH. REV. 337 (1976).

[51] 347 U.S. 483 (1954).

[52] *Id.* at 494, n.11.

[53] *Id.* at 494.

[54] *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[55] *But see* Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROB., Autumn 1978, at 57, arguing that, in the more recent cases, the Court, or at least some of its members, has adopted the position that "nondiscrimination" rather than integration through busing of pupils is the appropriate remedy.

The white flight research has once again transformed the way the school desegregation issue is viewed. Now neither desegregation itself nor test score gains are sufficient to support a systemwide plan. If the rate of white suburbanization increases during the transition year—that is, the first year in which the desegregation plan is implemented—desegregation is often described as a failure. The initial problem of racial segregation, viewed from the perspective of minority children, has been reformulated as a problem of urban neighborhood stability, viewed from the perspective of the central city white. The policy recommendation Coleman derived from his white flight study[57] calls for very limited or voluntary desegregation. Although the federal government had once been hailed by Northern intellectuals for forcing desegregation in Little Rock in 1958 in spite of local resistance,[58] the new mode of analysis made local resistance a justification for inaction. For example, in pending cases in St. Louis,[59] Los Angeles,[60] San Diego,[61] and elsewhere school districts placed heavy emphasis on specially commissioned social science research and testimony concerning white flight to support their contention that desegregation should be strictly limited.[62]

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[56] Studies have shown that while the average minority pupil scores lower than the average white pupil on achievement tests at every grade level, the gap between the two groups increases rather than decreases with more years of schooling. For example, blacks in the metropolitan Northeast are 1.6 years behind whites in the same region at 6th grade, 2.4 years behind at 9th grade, and 3.3 years behind at 12th grade. COLEMAN REPORT, *supra* note 7, at 21.

[57] J. COLEMAN, *supra* note 4.

[58] Cooper v. Aaron, 358 U.S. 1 (1958).

[59] A special survey was commissioned by the Board of Education of St. Louis. One unusual feature of the survey was that the pollsters were provided with copies of a letter from the mayor urging citizens to cooperate as part of the survey. The study was conducted by the St. Louis Research Group, Inc. Population and Desegregation: City of St. Louis (September 23, 1977) (unpublished report).

[60] The Los Angeles telephone survey of possible white flight was directed by David Armor and conducted by Marylander Marketing Research. *See* Marylander Marketing Research, note 171 *infra*. In *Crawford v. Board of Education*, the results, accompanied by declarations by several social scientists, were offered as evidence. *See, e.g.*, Continued Deposition of David J. Armor, Crawford v. Board of Educ., No. C 822 854 (Los Angeles County Super. Ct., June 6, 1977).

[61] David Armor conducted research and testified for the school board in the San Diego case on the white flight issue. His research is cited in Armor, White Flight, Demographic Transition, and the Future of School Desegregation (Aug. 1978) (paper presented at the American Sociological Association Meetings, San Francisco, California).

[62] Although the question whether courts should consider the phenomenon of "white flight" in shaping a desegregation remedy has surfaced in several lower court cases, the Supreme Court has not yet directly confronted the issue. *See* discussion in Levin & Moise, *School Desegregation Litigation in the Seventies and the Use of Social Science Evidence: An Annotated Guide*, 39 LAW & CONTEMP. PROB., Winter 1975, at 50, 93-98.

As the language of the research community has come to displace the language of the court decisions, we have begun to talk about desegregation in a strange way: discussion centers on demographic change rates, test score standard deviations, and indices of self-concept. Rarely is desegregation discussed as an important end in itself or even as the appropriate remedy for the deliberate violation of constitutional rights.

III

Social Scientists as the Enemy: The Perspective of Civil Rights Leaders

From World War II until the mid-sixties, civil rights leaders believed they had important allies in the universities who provided both intellectual support for the movement and volunteers for direct action. No leading scholar attacked the goal of integration. During the early seventies, however, civil rights groups discovered that the involvement of social scientists in both the judicial and legislative process was a double-edged sword that seemed to cut more powerfully against desegregation than it ever had against segregation. The research findings of Professors Armor and Coleman were cited in support of efforts to resist desegregation. Daniel P. Moynihan's Labor Department study, *The Negro Family*, seemed to blame the problems of society on the weakness of the black family.[63] Even the old issue of genetic inferiority was reawakened in the widely-discussed writings of Arthur Jensen.[64] Civil rights leaders who had been disappointed by the backlash against affirmative action on campus feared a revival of turn-of-the-century "scientific racism."[65]

The crisis produced searing attacks on individual social scientists by prominent civil rights leaders and a deepening distrust of the entire research enterprise. Coleman's white flight paper,[66] for example, generated repeated denunciations by the NAACP and such leading black scholars as Kenneth B. Clark and Robert Green.[67] Constitutional rights, they insisted, must not depend upon the particular approach to the use of the regression equations in fashion in any given year or the current racial mood in academe. A basic mistrust grew.

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[63] U.S. Labor Dep't, The Negro Family: The Case for National Action (1967). For a critique of this study, see L. Rainwater & W.L. Yancey, The Moynihan Report and the Politics of Controversy (1967).

[64] Jensen, *How Much Can We Boost IQ and Scholastic Achievement?*, 39 Harv. Educ. Rev. 1 (1969).

[65] The development of theories of black inferiority by leading social theorists helped to justify the disenfranchisement of Southern blacks and the ending of Reconstruction era civil rights protections in the late nineteenth and early twentieth centuries. *See generally* The Development of Segregationist Thought (I. Newby ed. 1968).

[66] J. Coleman, *supra* note 4.

[67] N.Y. Times, June 25, 1975, at 49, col. 1; *id.*, July 3, 1975, at 23, col. 1; Wash. Post, July 1, 1975, § C, at 1, col. 6.

As long as the decisions of the federal courts continued to require substantial desegregation in urban school districts, the strategy of civil rights groups was to treat research as irrelevant while denouncing researchers who recommended less integration. In the 1974-77 period, however, when the Supreme Court moved to severely constrain the possibility of effective and lasting desegregation in many urban centers, the strategy became less viable. The Supreme Court's decisions in the Detroit,[68] Pasadena,[69] and Dayton[70] cases showed that the Court had begun to accept a number of propositions about the nature of urban racial change that precluded significant desegregation in many cities. Research on these propositions has thus become a matter of urgency if civil rights lawyers are to avoid erosion of existing legal principles. At a time when their opponents are actively using and even financing research that supports their position against desegregation, continued opposition to social science research among integrationists leaves the field to the critics.

IV

THE RELATIONSHIP BETWEEN RESEARCH AND POLICYMAKERS' ASSUMPTIONS ABOUT SOCIETY AND RACIAL CHANGE

A. The Role of Politics

Since 1972, the political intensity of the busing issue has declined and few new plans have been implemented, yet the assumptions of researchers critical of busing have become more widely accepted. Busing was not a major issue in the 1976 election. Yet even though the external pressures had eased, support for desegregation efforts continued to shrink.

The political character of the issue changed because desegregation had become routine in much of the South and relatively little was undertaken in the North. The 1972 election took place in the midst of the South's first year of large-scale busing,[71] also a period when lower federal courts were ordering metropolitan desegregation.[72] Four years later the antibusing groups had disbanded in most of the South, and public attention had turned to new issues. By 1975, the Supreme Court had ruled against metropolitan desegregation except in very special circumstances.[73] Only one or two Northern cities were desegregating each year.[74]

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[68] Milliken v. Bradley, 418 U.S. 717 (1974).

[69] Pasadena City Bd. of Educ. v. Spangler, 423 U.S. 1335 (1975).

[70] Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977).

[71] There were far more urban desegregation orders in 1971 and 1972 than in any year since because it was then a relatively simple matter for civil rights lawyers to file motions to update existing desegregation orders in the South to meet the new Supreme Court standards articulated in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[72] Note 17 *supra*.

[73] *See* Evans v. Buchanan, 423 U.S. 963 (1975) (summary affirmance); Milliken v. Bradley, 418 U.S. 717 (1974).

Each federal court order seemed to stimulate a new round of antibusing legislation in Congress. The Detroit litigation[75] led to the proposal of amendments by several Michigan Congressmen and Senator Robert Giffin (R-Mich.),[76] and the Boston litigation[77] triggered proposals by Representative Joe Moakley (D-Mass.).[78] The St. Louis[79] and Kansas City, Missouri[80] litigation brought Senator Thomas Eagleton into the lists, and the Wilmington struggle[81] changed the stance of a previously supportive senator, Joseph Biden.[82] Biden led the 1975 Senate struggle to end the authority of the U.S. Department of Health, Education, and Welfare to require suburban school desegregation through busing[83] and joined with Eagleton in sponsoring 1977 legislation[84] even more drastically limiting the Department's powers.[85]

Presidential candidates in 1976 sought some way either to defuse the busing issue or to identify themselves with the antibusing position. President Ford attacked the courts and asked Congress to enact a bill that would strictly limit both the scope and duration of busing orders.[86] Ronald Reagan campaigned for the GOP convention's platform and endorsed an antibusing amendment to the Constitution.[87]

Yet the issue never became a major theme in any campaign because early efforts to exploit it failed. Even in Boston, which had experienced the country's most severe recent polarization over the issue, Senator Henry Jackson's widely advertised promises to fight "forced busing" were of little avail. Whites for whom this was a "voting issue" were much more likely to vote for an extremist candidate like George Wallace than for a liberal convert to the antibusing wars.[88] Moreover, Jackson's identification with the issue exposed him to a biting counterattack in the crucial Florida primary where Jimmy Carter accused Jackson of using an issue "which has connotations of racism."[89]

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[74] *See* 122 CONG. REC. S7398 (daily ed. May 18, 1976) (record of urban desegregation prepared by U.S. Dep't of Justice).

[75] Milliken v. Bradley, 418 U.S. 717 (1974); Bradley v. Milliken, 484 F.2d 275 (6th Cir. 1973); Bradley v. Milliken, 345 F. Supp. 914 (E.D. Mich. 1972).

[76] S. 179, 93rd Cong., 1st Sess. (1973); H.R. 41, 93rd Cong. 1st Sess. (1973).

[77] Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974), *aff'd sub nom.*, Morgan v. Kerrigan, 509 F.2d 580 (1st Cir.), *cert. denied*, 421 U.S. 963 (1975).

[78] H.R. 2392, 94th Cong., 1st Sess. (1975).

[79] United States v. Missouri, 363 F. Supp. 739 (E.D. Mo. 1973), *enforced*, 388 F. Supp. 1058 (E.D. Mo. 1975), *aff'd in part, rev'd in part and remanded*, 515 F.2d 1365 (8th Cir. 1975), *modified* (E.D. Mo. 1975) (unreported), *remanded*, 523 F.2d 885 (8th Cir. 1975).

[80] School Dist. v. Missouri, 438 F. Supp. 830 (1977), *transferred*, 460 F. Supp. 421 (1978), *appeal dismissed per curiam*, 529 F.2d 493 (1979).

[81] Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd mem.*, 423 U.S. 963 (1975).

[82] Wilmington Morning News, June 15, 1974; *id.*, July 10, 1974.

[83] S.J.Res. 119 94th Cong., 1st Sess. (1975). Opposition to busing of students (printed) (July 31, 1975).

[84] Eagleton-Biden Amendment of 1977, Pub. L. No. 95-205, 91 Stat. 1460 (1977).

[85] N.Y. Times, June 17, 1977, at 1, col. 3.

[86] President's Message to Congress Transmitting the Proposed School Desegregation Standards and Assistance Act of 1976, 12 WEEKLY COMP. OF PRES. DOC. 1080 (June 28, 1976).

[87] GOP Platform Highlights, CONG. Q. 2296 (Weekly Rep., Aug. 21, 1976).

[88] Wash. Post, March 1, 1976, § A, at 4, col. 5.

Carter's own position on the issue was carefully crafted to reflect both the unpopularity of the issue and its declining importance. Carter hailed the integration of Southern schools but said that he opposed large-scale busing, and preferred voluntary plans and increased black control over segregated inner city school systems. He promised, however, to enforce the law and oppose efforts to amend the Constitution. The Democratic convention adopted a statement that was only modestly more supportive, calling busing a "judicial tool of last resort."[90] The platform called for active work on other approaches, including the use of magnet schools.[91] President Carter avoided the issue completely during his first year in office. The Justice Department adopted a more positive attitude, but it neither initiated important new cases nor pressed for the cross-district plans needed to accomplish integration in many cities.[92]

Pronouncements of candidates and government officials do much to set the atmosphere within which desegregation plans are shaped. During the mid-1970s their almost uniform opposition to busing convinced many that busing itself was the problem. The consequence was a strong tendency to propose plans requiring a minimum amount of busing.[93] It was assumed that minimizing busing would diminish opposition to desegregation and enhance residential stability, although existing research provides no support for these assumptions.[94]

B. The Empirical Assumptions on which Desegregation Policies Are Based

Explicit or implicit assumptions about society and racial change underlie the various desegregation policies that are put forward. Although policymakers often claim that their assumptions are supported by research, their information about existing research usually is derived through the selective screens of the media and political debate. One can, however, identify the empirical assumptions on which specific policy decisions rest and determine the extent to which they are congruent with or in clear conflict with existing research findings.

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[89] N.Y. Times, March 4, 1976, at 20, col. 1.

[90] 122 CONG. REC. S11580 (daily ed., July 2, 1976).

[91] *Id.*

[92] The Department did respond to the requests of federal judges in St. Louis and Cleveland that it become a participant in pending litigation, but it did not initiate new urban cases. The Department in the Carter Administration took a more supportive role than the Ford Administration Justice Department officials had in urging city-wide desegregation in the *Dayton* case. *See* United States' Amicus Curiae brief No. 76-539, Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977).

[93] In Corpus Christi, Texas, the school district reached the illogical extreme of requiring "massive crosstown walking," assigning 10,000 students to schools up to 1.9 miles outside their neighborhoods, without providing any transportation. Ozio, *Corpus Christi*, 15 INTEGRATED EDUC., Nov.-Dec., 1977, at 5.

[94] *But see* Rossell, *School Desegregation and Community Social Change*, *supra* note 42 at 133.

The desegregation plans submitted by school districts and the policies promoted by Congress and the executive branch in recent years reflect the following implicit assumptions about the desegregation process:

1. The amount of busing is the principal basis for resistance to desegregation; political controversy will be far less severe with less busing;
2. Large-scale desegregation plans intensify white flight; limited plans produce greater stability;
3. Voluntary procedures (particularly magnet school plans) can produce substantial integration;
4. One-way busing is an acceptable solution;
5. Desegregation plans that exclude the early grades are more effective;
6. Integration of faculties is a significant step even in the absence of student integration;
7. Bilingual education programs meet the principal needs of Hispanic children and are more effective in ethnically isolated schools or classrooms;
8. There are alternatives to integregation—*e.g.*, community controlled schools or compensatory education that may be more effective than desegregation and are more acceptable to minority as well as majority children.

In the last two years, some court-ordered plans have come to reflect the same assumptions, implicitly eroding a series of constitutional requirements that had been articulated in earlier cases.[95]

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[95] The Supreme Court's declaration in the Little Rock case, Cooper v. Aaron, 358 U.S. 1 (1958), that public resistance could not be allowed to prevent the enforcement of constitutional rights seems to militate against restricting the scope of desegregation in order to lessen the extent of white flight. Restricting the scope of desegregation plans also appears to violate the mandate of Green v. County School Bd., 391 U.S. 430 (1968), that school systems must eliminate racially identifiable schools. Plans accepted by some courts fail to comply with the Supreme Court's unanimous decision in Alexander v. Holmes County Bd. of Educ., 396 U.S. 1218 (1969), that school districts be desegregated immediately once a violation was proven. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), which upheld systemwide busing where necessary to disestablish a dual school system, and which held that the burden was on the school district to demonstrate that one-race schools were not "vestiges" of past de jure segregation, seems to be ignored. The right of Hispanic children to be educated in a desegregated system, as articulated in Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), is often neglected in the establishment of ethnically isolated bilingual programs.

1. *The Return to Freedom of Choice: The Magnet School Movement*

In perhaps the most important decision since *Brown*, the Supreme Court ruled in 1968 that merely offering black students "freedom of choice" to transfer schools was not enough.[96] To be acceptable, school desegregation plans must actually uproot the system of separate schools.[97] As a result of this decision, substantial desegregation occurred in the South.

Ironically, a decade later a new variation of the "freedom of choice" plan has become the favored approach to desegregation in cities across the country. The premise of the so-called magnet school plan is that black, Hispanic, and white students can be attracted in sufficiently large numbers to desegregated schools that offer special educational approaches to make compulsory busing unnecessary. Magnet schools have become the centerpiece of school desegregation plans in a number of the nation's largest districts—for example, St. Louis, San Diego, Houston, Cincinnati, Chicago, Milwaukee, and Philadelphia. The magnet school plan is often presented to the community, the press and the courts as an effective method of ending segregation. The fact that no large urban district has ever been fully desegregated through the use of magnet schools is ignored.

It is not surprising that local school authorities proposed the magnet school idea and that local politicians hailed it, since this would mean no involuntary busing of any children. The surprising thing, however, is the increasingly serious way some courts have treated the issue. Congress further heightened interest in this approach to desegregation by enacting a law providing funds for the development of magnet school programs.[98] Although nothing in the measure limited the right of the courts to order further desegregation, the congressional action did tend to reinforce the notion that magnet schools were a serious alternative solution.

During 1977 virtually all of the large urban school desegregation cases on the West Coast involved magnet school plans. The Pasadena school board included magnet schools in its desegregation plan and appealed to have the compulsory features of the federal court order dropped. The state court judge in the San Diego case accepted a plan that provided that 3,000 of the district's 120,000 children would be enrolled in integrated magnet schools.

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[96] Green v. County School Bd., 391 U.S. 430 (1968). The Court did not hold that a "freedom of choice" plan might in itself be unconstitutional, but stressed that such plans would not be permitted where alternatives "promis[ed] speedier and more effective conversion to a unitary, nonracial school system" existed. *Id.* at 439, 440-41.

[97] *Id.* at 437-38.

[98] Emergency School Aid Act of 1976, Pub. L. No. 94-482, § 321(a)-(c), 90 Stat. 2216-17 (codified at 20 U.S.C. §§ 1603, 1606, 1619 (1976); 122 CONG. REC. S5733 (daily ed., April 14, 1976). The bill was introduced by Ohio's Senator John Glenn, who was reacting to the fact that five of the largest districts in his state were facing court orders to desegregate.

Since some of the magnet schools were already in operation, the plan was to involve only 1,100 additional transfers, less than 1 percent of the district's enrollment. The remainder of the plan provided for the establishment of specialized classes in which students from various schools could participate for a portion of the school day. The district planned to bus a total of 900 additional children later in the school year to learning centers one day a week for integrated classes in music and art.[99]

Judge Louis Welsh, an elected judge who would have to run again for office, accepted the school district's proposals, reserving judgment on whether additional steps would be mandated if the voluntary plan failed. The court order actually required that only four additional magnet schools be established, offering curricula in government and law enforcement, schools teaching foreign languages by the immersion method, and elementary schools emphasizing fundamentals.[100] School desegregation experts for the state of California ranked the chances for the success of this plan very low, noting that "no city in the nation has met a court order to desegregate its schools by using voluntary programs only."[101]

Another California state judge, Paul Egly, accepted a magnet school plan for the San Bernardino school system, which has a total enrollment of only 31,000 students. The city proposed to desegregate its fifteen most segregated elementary schools by offering special magnet programs in each part of town. In addition, there were to be two-week interracial visits between white and minority schools. NAACP Attorney Nancy Reardan claimed that although the voluntary programs might succeed in moving some black children out of segregated schools, "no voluntary program in California" had brought white volunteers in sufficient numbers to desegregate a ghetto or barrio school. She also objected to the school district's definition of an integrated school as one with an 80 percent white student body.[102]

Although the Los Angeles School District's desegregation plan, which involved little more than voluntary part-time busing of middle grade intermediate level students, had been rejected as inadequate by the California judge,[103] a program of magnet schools and voluntary transfers was the only plan in operation in the fall of 1977, pending the development of a more extensive desegregation plan. Two new magnet schools had a voluntary enrollment of 700 children, desegregating about 0.1 percent of the district's students. The voluntary transfer plan, long the city's only desegregation effort, attracted 18,500 students in 1977, about 3 percent of the district's students and a large increase over the previous year.[104] A more extensive plan to desegregate grades four through eight was implemented in September 1978, after the court rejected a purely voluntary approach.

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[99] San Diego Union, Aug. 6, 1977.

[100] *Id.*

[101] *Id.*, Aug. 25, 1977.

[102] L.A. Times, Aug. 8, 1977, § 1, at 20, col. 4.

[103] Crawford v. Board of Educ., 17 C.3d 280, 551 P.2d 28 (1976).

Seattle is yet another major Western community that decided to rely initially on a voluntary approach.[105] The 59,000 student system, which had never been under a court order to desegregate, opened classes in the fall of 1977 with approximately 4,000 children being bused to twenty-eight city schools offering a variety of magnet programs, which were not necessarily integrated with the regular classes in a given school. The sole integrated experience of some of the children was in the lunchroom.[106] The Seattle school board responded to the inadequacies of the approach by implementing a mandatory plan in fall of 1978.

The principal desegregation effort in the Upper Midwest continues to revolve around the magnet school approach. The first two years of the Milwaukee desegregation plan relied almost completely on voluntary transfers by minority children to schools with specialized curricula.[107] Even before the court order, the district's superintendent of schools had been planning large experiments of this type in the hope of retaining the system's middle class white families. By the fall of 1977, out of a total enrollment of approximately 100,000, 14,000 children, nine-tenths of whom were black, were being bused to magnet schools.[108]

Buffalo, New York—the only major system in the state of New York to come under a federal court order—also relied on magnet schools. Judge John T. Curtin accepted a plan for the establishment of eight new magnet schools in lieu of a more extensive desegregation plan.[109] The school district had previously closed ten schools and opened one magnet school.[110]

Reliance on magnet schools to desegregate occurred even in districts where the practical obstacles to desegregation were relatively minor. For example, in Chula Vista, California, where the busing of only 250 students was required for desegregation, the district abandoned its agreement to desegregate when the federal government provided only half the $300,000 the system had requested. Instead a limited magnet school program was adopted, which was designed to reach no more than a third of the students.[111]

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[104] L.A. Times, Sept. 21, 1977, § 2, at 1, col. 5.

[105] In December 1977, the Seattle school authorities adopted a mandatory plan, recognizing that a totally voluntary approach would fail. Seattle Times, Dec. 15, 1977, at 1; N.Y. Times, Jan. 3, 1978, at 1, col. 5.

[106] Seattle Post-Intelligencer, Sept. 8, 1977, § A, at 5, col. 4.

[107] Amos v. Board of School Directors, 408 F. Supp. 765 (E.D. Wis.), *aff'd sub nom.*, Armstrong v. Brennan, 539 F.2d 625 (7th Cir. 1976), *vacated and remanded*, 433 U.S. 672 (1977).

[108] Milwaukee J., Aug. 14, 1977, § 2 at 1, col. 1; *id.*, Sept. 6, 1977. *Id.*, Sept. 13, 1977.

[109] Arthur v. Nyquist, 415 F. Supp. 904 (W.D. N.Y. 1976), *aff'd*, 429 F. Supp. 206 (W.D. N.Y. 1977), *aff'd in part, rev'd and remanded in part*, 573 F.2d 134 (2d Cir. 1978).

[110] Buffalo Evening News, Aug. 10, 1977.

Even the largest school systems resorted to magnet school solutions in spite of the fact that the record had been highly disappointing to similar districts in the past. Chicago, which had two magnet schools, responded to heavy pressure from the Illinois State Board of Education with a first stage plan for 1977 that bused 700 children out of overcrowded ghetto schools. The city's planning for future desegregation emphasized five more years of voluntary efforts costing $50 million a year.[112] The Los Angeles plan[113] remained partially voluntary for the 1978-79 school year, though there was a provision for limited mandatory desegregation in grades four to eight.[114]

The popularity of magnet schools and other voluntary approaches grew even as the research evidence on their failure to achieve desegregation became increasingly unambiguous. Though negative research findings seem to have a powerful impact in eroding support for remedies to segregation, negative evidence has no discernible impact on the belief that there are alternatives to busing.

Perhaps the most important test of magnet schools was in Houston, where the plan called for moving 5,000 students from their neighborhood schools to magnet schools. It fell far short of its goal, however. In 1970, the school system had developed a limited desegregation plan that was also a failure. Schools enrolling almost 18,000 minority children but only 1,700 Anglos had been paired. Under this plan, 6,000 Mexican American children were counted as white. Four years later, the segregated nature of the eleven sets of paired schools had significantly worsened, with only about 3 percent of the total remaining population in the "desegregated" schools being Anglo.[115] The failure of this pairing plan and the need for further steps led to the development of a very extensive magnet school approach. Thirty-four new programs were implemented in 1975 and another eleven in 1976. When the program began, 3,167 students transferred, but a number of schools involved remained highly segregated.[116]

Although Houston's desegregation plan had left the white population virtually untouched, the city still suffered the rapid decline in Anglo enrollment so characteristic of large cities, falling from 125,000 in 1970 to 83,000 in

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[111] San Diego Union, Aug. 4, 1977.

[112] Chi. Daily News, Sept. 8, 1977, at 1, col. 2; Chi. Trib., Dec. 6, 1977, at 2, col.1

[113] Discussed *supra* notes 103 and 104 and accompanying text.

[114] Crawford v. Board of Educ., No. C 822, 854 (Super. Ct. of Cal., Feb. 7, 1978) (unpublished minute order); Los Angeles City Board of Education, 1 Los Angeles Plan for Student Integration: Integrated Educational Excellence Through Choice (Mar. 12, 1979).

[115] Campbell & Brandstetter, The Magnet School Plan in Houston, in THE FUTURE OF BIG-CITY SCHOOLS: DESEGREGATION POLICIES AND MAGNET ALTERNATIVES 124-38 (D. Levine & R. Havighurst eds. 1977).

[116] *Id.* at 137.

1975.[117] Critics of course attributed the "flight" of 42,000 students to desegregation, though there had been no busing plan and less than 2,000 white children had ever been involved in involuntary pairing.

The record was similar in St. Louis. There the federal court initially had permitted an out-of-court settlement that attempted to expand integration in the city through voluntary transfers.[118] Very few schools were desegregated under the plan.[119] Civil rights groups, with Justice Department support, sued for further action.[120]

Magnet programs in other cities had records ranging from modest positive to negligible consequences. In Cincinnati, which had made an ambitious magnet program the centerpiece of its plan, about one-sixth of the students were enrolled in some kind of alternative school by fall 1975 and the level of segregation in the city was slightly lowered. However, even under the most optimistic projections of local school officials, six-tenths of the students would remain outside the program.[121] The Chicago school system failed to attract white students to its second highly publicized and highly expensive magnet school. Flint, Michigan—a relatively small system heavily supported by the Mott Foundation—succeeded in transferring two-fifths of its student enrollment to magnet schools programs. Nevertheless, thirteen schools remained as segregated as ever, with more than 90 percent black students.[122] Most of the magnet schools in Dallas fell far short of their goals, with some remaining "essentially one-race schools."[123]

Despite this record, when the long-delayed Philadelphia school desegregation case came to a head in the Pennsylvania state courts the magnet school idea again was relied upon. After nine years of enforcement efforts by the state Human Relations Commission and a favorable state supreme court ruling,[124] the state trial court held that the school district only need implement its voluntary magnet school plan and granted the district another eighteen months' delay to plan for further desegregation.[125] The superintendent, however, announced that the school board probably would not have the necessary money to implement even the voluntary plan, which state officials estimated would integrate no more than 10 to 15 percent of the city's students.[126]

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[117] *Id.* at 138.

[118] Liddell v. St. Louis Bd. of Educ., 72C-100(1) (E.D. Mo.) (settled Dec. 24, 1975).

[119] St. Louis Post-Dispatch, July 6, 1977, § A, at 3, col. 5.

[120] The NAACP intervened pursuant to an order by the Court of Appeals for the Eighth Circuit, Dec. 13, 1976, and the Justice Department intervened July 27, 1977. The District Court for the Eastern District of Missouri held that the St. Louis School authorities had met the burden of showing that they had not acted with segregative intent and that all parties were bound by the prior settlement. Liddell v. Board of Educ., 469 F. Supp. 1304 (E.D. Mo., 1979).

[121] Waldrip, *Alternative Programs in Cincinnati or "What Did You Learn on the River Today?"*, in The Future of Big-City Schools: Desegregation Policies and Magnet Alternatives 95 (D. Levine & R. Havighurst eds. 1977).

[122] Grant, *Flint*, 15 Integrated Educ., Nov.-Dec. 1977, at 18.

[123] Trombly, *Dallas*, 15 Integrated Educ., Nov.-Dec. 1977, at 20.

[124] Pennsylvania Human Relations Comm'n v. School Dist., 23 Pa. Cmmw. Ct. 312, 352 A.2d 200 (1976).

[125] Pennsylvania Hum. Rel. Comm'n v. School Dist., 30 Pa. Commw. Ct. 644, 374 A.2d 1014 (1977), *aff'd*, 480 Pa. 398, 390 A.2d 1238 (1978).

The magnet approach had been chosen in spite of Philadelphia's own prior experience with seven magnet schools. Four of the seven magnet high schools were at least 95 percent black. The only increase in integration had occurred at the magnet school offering aerospace studies where an almost all-white school had attracted about 5 percent more blacks. One magnet school enrolling 3,200 pupils had a total of *two* white students.[127]

The evidence showed that magnet schools and other "freedom of choice" procedures worked best when they were used not as a substitute for a compulsory plan but as a component of such a plan. When desegregation is inevitable, the development of magnet school curricula can add an important element of educational choice to the process. Boston children, who were required by court order to be bused,[128] were attracted in large numbers to the special schools developed in the Phase II plan.[129] Under a clear judicial mandate to implement a compulsory reassignment plan in those schools that could not be desegregated on a voluntary basis,[130] the Milwaukee school staff developed great interest in encouraging transfers. Without a framework requiring a mandatory change, neither the school administration's interest in making the program work nor the parents' interest in avoiding a forced reassignment is brought into play.

2. *One-Way Desegregation*

Most magnet plans, particularly those in big cities, rely primarily on transfers of minority children to schools in white or transition areas. Even when there is mandatory reassignment, policymakers often try to minimize white fears by closing minority schools and busing their students out to white areas.

This trend was evident in several plans adopted in 1977. The very limited Kansas City, Kansas, plan closed a black school and bused 490 children to other schools.[131] In Fort Wayne, Indiana, three all-black neighborhood schools were closed, and nearly 700 black children were sent elsewhere.[132] Virtually all of the thousand involuntary transfers as well as the great majority of voluntary changes in Milwaukee involved minority children.[133] The Portland,

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[126] Phil. J.-Herald, July 2. 1977.

[127] Franklin, *Magnet Schools Fail in Philadelphia*, INTEGRATED EDUC., Nov.-Dec. 1977, at 95.

[128] Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass.), *aff'd sub nom.*, Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

[129] Morgan v. Kerrigan, 401 F. Supp. 216, 246-48 (D. Mass. 1975).

[130] Amos v. Board of School Directors, 408 F. Supp. 765 (E.D. Wis.), *aff'd sub nom.*, Armstrong v. Brennan, 539 F.2d 625 (7th Cir. 1976), *vacated and remanded*, 433 U.S. 672 (1977).

[131] Kansas City Times, Aug. 29, 1977, § A, at 4, col. 1.

[132] Fort Wayne News-Sentinel, Sept. 7, 1977; Fort Wayne J.-Gazette, Sept. 7, 1977.

[133] Milwaukee J., Aug. 14, 1977, § 2 at 1, col. 1.

Oregon, school superintendent rejected busing for white children but permitted the busing of 2,700 minority children from their neighborhood schools.[134] Superintendent Blanchard had proposed to avoid resegregation by expanding the number of minority students to be bused.[135] In Delaware, the State Board of Education proposed to desegregate the entire Wilmington metropolitan area using one-way busing of minority students, but this extreme proposal was rejected by the federal court.[136]

There is no social science evidence to suggest that one-way desegregation is superior, and such plans frequently generate overt opposition in parts of the minority community. There was extensive criticism of such plans by the minority communities in Milwaukee and Portland, for example, and black groups filed a lawsuit in Fort Wayne, Indiana, to stop one-way busing.[137] Black parents strongly criticized a one-way plan in Joliet, Illinois.[138] The plans were formulated not in response to evidence about the way to desegregate most effectively but in response to evidence about what the white community would accept. Polls showing whites more ready to accept one-way plans are taken seriously.[139] Research suggesting that the white fear of violence in schools in black neighborhoods has no basis in fact is ignored.[140]

3. *Desegregating Everything but the Students*

Under intense political pressures against school busing, much of the enforcement energy of the executive branch has focused in recent years on desegregating teachers while student segregation remains untouched. When HEW began compliance reviews of the nation's largest cities in the early seventies, it focused on the equality of school programs,[141] the distribution of faculty members by race,[142] and the provision of bilingual education programs for students of limited English-speaking ability.[143]

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[134] Portland Oregonian, July 3, 1977, § B at 5, col. 1.

[135] *Id.*, July 27, 1977.

[136] Evans v. Buchanan, 435 F. Supp. 832, 840 (D. Del. 1977).

[137] Altevogt & Nusbaumer, *Black Parents and Desegregation in Fort Wayne*, 16 Integrated Educ. 31 (July-Aug. 1978).

[138] Chi. Tribune, Jan. 25, 1978, § 1, at 3, col. 1.

[139] *See, e.g.*, L. Harris, The Anguish of Change 244-45 (1973); Schwartz & Schwartz, *Convergence and Divergence in Political Orientations between Blacks and Whites: 1960-1973*, 32 J. Soc. Issues, Spring 1976, at 157.

[140] *See, e.g.*, Information prepared by Community Relations Service, U.S. Dep't of Justice, in 122 Cong. Rec. S10708 (daily ed. June 26, 1976); U.S. Comm'n on Civil Rights, Fulfilling the Letter and Spirit of the Law: Desegregation of the Nation's Schools 145-46 (1976).

[141] The lengthy initial HEW outline of the New York City review, for example, did not even mention the segregation issue. G. Orfield, Must We Bus? Segregated Schools and National Policy 300 (1978).

[142] In New York, the extensive faculty desegregation plan that resulted produced a political uproar. Less attention was given to negotiation of similar plans in Chicago, Los Angeles, and elsewhere.

[143] A federal administrative law judge found Chicago in violation of bilingual education

After federal district judge John Sirica found HEW guilty of failing to enforce its own Title VI regulations, the agency was forced to initiate fund cut-off proceedings against a number of major school districts based on the violations disclosed in its investigations.[144] Faced with the prospect of losing federal aid, Chicago, New York City, and other school systems agreed to plans to redistribute their teachers proportionately across all schools.[145] Many other districts agreed to similar requirements in order to be eligible for Emergency School Aid Act (ESAA) funds.[146]

Faculty desegregation has long been recognized both by the courts[147] and by many social scientists[148] as a vital component of successful school desegregation. Without ending faculty segregation, the racial identifiability of schools would remain and students would lack role models of adult integration and the opportunity to relate to adults of their own and other racial and ethnic backgrounds.

There is no theory, however, to suggest that faculty desegregation in itself has significant positive impacts. The identity of a school with virtually all Hispanic students, for instance, is not significantly changed by the arrival of a few Anglo or black teachers. Nor is it clear that there will be any significant impact when a few Hispanic teachers are assigned to work in an all-English-language school. When student and teacher desegregation occur together, the entire school is fundamentally reconstituted, providing an opportunity to develop a new educational program responding to more diversified needs. Faculty desegregation without student desegregation produces a far more ambiguous transformation, which may sometimes be counterproductive.

4. *"Equal Opportunity" Through Segregation*

Another example of policy development without any empirical basis is reflected in HEW's conclusion that the problem of Hispanic children was not one of segregation but of language. Noting the low achievement scores of

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requirements on February 15, 1977. Chicago responded by negotiating an extensive agreement to avoid the loss of federal aid.

[144] Brown v. Weinberger, 417 F. Supp. 1215 (D. D.C. 1976) (Northern and Western school districts). *See also* Adams v. Califano, 430 F. Supp. 118 (D. D.C. 1977); Adams v. Weinberger, 430 F. Supp. 118 (D. D.C. 1977); Adams v. Richardson, 356 F. Supp. 92 (D. D.C. 1973) (Southern school districts).

[145] Chi. Tribune, Oct. 13, 1977, § 1, at 1, col. 5; N.Y. Times, Oct. 3, 1977, at 27, col. 1.

[146] Emergency School Aid Act of 1976, Pub. L. No. 94-482, § 321(a)-(c), 90 Stat. 2216-17 (codified at 20 U.S.C. §§ 1601-1619 (Supp. V 1975). The purpose of this act is to provide financial assistance to school districts to help them eliminate minority group segregaton and discrimination among students and faculty in public schools and to aid school children in overcoming the educational disadvantages caused by minority group isolation.

[147] Bradley v. School Bd., 382 U.S. 103 (1965).

[148] *See, e.g.*, Report of Dr. Thomas Pettigrew to the Superior Court of the State of California for the County of Los Angeles in *Crawford v. Board of Education*, November 14, 1978, pp. 22-23. Crawford v. Board of Educ., 17 C.3d 280, 551 P.2d 28 (1976).

Hispanic children, HEW blamed English-language instruction, English-language tests, and cultural bias in the curriculum. The appropriate remedy was defined as implementation of a bilingual-bicultural school program. Although there appeared to be no evidence that such programs would work and although a large majority of Hispanic children knew sufficient English to function in regular classrooms, HEW halted its investigations into segregated schooling and required school systems to adopt the new educational approach.[149] Scores of districts complied, often relying on federal bilingual program funds to finance the changes.[150] A recent study has found that these bilingual programs are highly segregated and that project directors seldom transfer children back to English-language classrooms after they have mastered the English language.[151] The first national evaluation of federal bilingual programs, published in 1977, found no evidence that the programs improved either academic achievement or attitudes toward school. There was even some highly controversial evidence that children enrolled in bilingual programs were less likely to improve their English language skills than children for whom no program was provided.[152] Though the justification for the displacement of desegregation by bilingual remedies was on the basis of educational needs, the movement proceeded without any initial evidence and grew in spite of continued disappointing research results. The advantage of this approach, however, was that it could be implemented with little visibility or controversy since its impact was almost wholly limited to segregated minority communities.

5. *Other Alternatives to Desegregation*

The intense resistance to desegregation has stimulated a continuing search for some other solution to the problems of discrimination in urban schools. The solutions most frequently discussed in Congress and sometimes considered by the courts include additional resources for education in segregated schools and more positions in school administration for nonwhites. Providing additional resources to ghetto and barrio schools rather than integrating them has been a strong and continuous theme. It is reflected in the largest federal aid-to-education program, Title I of the Elementary and Secondary Education

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[149] For a full account of the development of HEW enforcement procedures, see G. ORFIELD, *supra* note 141, ch. 7, 9. *See also* ROOS, *Bilingual Education: The Hispanic Response to Unequal Educational Opportunity*, 42 LAW & CONTEMP. PROB., Autumn 1978, at 111.

[150] N. EPSTEIN, LANGUAGE, ETHNICITY, AND THE SCHOOLS: POLICY ALTERNATIVES FOR BILINGUAL-BICULTURAL EDUCATION 2, 14-15 (1977) (Institute for Educational Leadership).

[151] AMERICAN INSTITUTES FOR RESEARCH, EVALUATION OF THE IMPACT OF ESEA TITLE VII SPANISH/ENGLISH BILINGUAL EDUCATION PROGRAM (1977).

[152] *Id.* at xxx-xxxi. Both the methodology used by this evaluation and the conclusions drawn have been strongly criticized (*see* sources cited in Roos, *supra* note 149, at 111, n.64) and the results must be regarded as very tentative. Nonetheless, there is no convincing evidence for the contrary proposition.

Act,[153] which channels funds for compensatory and remedial programs to schools with concentrations of poor children. President Nixon's 1972 legislative proposals offered aid to improve inner city schools as an explicit alternative to desegregation.[154] Legislative proposals to provide substantial funds to these schools, however, have fared very badly on the floor of Congress.[155]

The emphasis on the compensatory program alternative occurred in spite of research showing generally negative evaluations of their educational impact.[156] When HEW Secretary Richardson testified in behalf of the Administration's bill in 1972, he indicated that there was evidence that desegregation had a positive effect on achievement greater than or equal to that of compensatory programs, which the Nixon Administration proposed to substitute for desegregation.[157] The negative evidence on compensatory programs was only brought into the policy debate when President Nixon used such evidence to justify his vetoes of education appropriations and when the Supreme Court sought to justify its decision in *Rodriguez* refusing to overturn inequitable state school finance systems.[158] Policymakers insisted that compensatory programs worked when desegregation was threatened, but contended that these programs were useless when redistribution was proposed.

Compensatory education as an alternative to desegregation is implicit in the Supreme Court's second *Milliken* decision.[159] Three years earlier, the Court had rejected a metropolitan area desegregation plan as a remedy for the de jure segregated school system of Detroit.[160] When the case was remanded to the federal district court, a very limited desegregation plan was approved—one confined to the Detroit school district and involving the reassignment of only about a tenth of the district's pupils.[161] The district judge, however, required the state government to finance various programs in remedial reading, counseling and career guidance, multi-ethnic topics, and staff training.[162] The Supreme Court unanimously sustained this unusual order,[163] providing the first definitive judicial recognition of what has become increasingly apparent in research on desegregation—that desegregation is a long process requiring curricular and other educational changes to make it effective.[164] Nevertheless, the practical effect of the Supreme Court's decisions in the *Milliken* cases, first preventing any significant desegregation by prohibiting a metropolitan area plan, and then providing money for compensatory education programs, may be to push frustrated litigants toward the latter as an alternative to desegregation rather than as a necessary component of desegregation.

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[153] 20 U.S.C. § 241a (Supp. V 1975).

[154] Special Message to the Congress on Equal Educational Opportunities and School Busing, PUB. PAPERS 425-43 (March 17, 1972).

[155] Congressional Research Service shows substantial declines, in constant-value dollars, in the amounts appropriated for the major federal compensatory and desegregation programs between the early and mid-seventies. *See* SENATE COMM. ON HUMAN RESOURCES, 95TH CONG., 1ST SESS., DESEGREGATION AND THE CITIES—THE TRENDS AND POLICY CHOICES 39 (Comm. Print 1977) (prepared by G. Orfield).

[156] See T. Thomas & S. Pelavin, Patterns in ESEA Title I Reading Achievement (1976), for summaries of much of the earlier research literature on this compensatory program. The first major evidence that additional resources have little impact on achievement was in the 1966 *Coleman Report*.

[157] *Equal Educational Opportunities Act of 1972: Hearings before Senate Comm. on Labor and Public Welfare, Subcomm. on Education*, 92d Cong., 2d Sess. 289 (1972) (testimony of HEW Sec. Elliot Richardson).

[158] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 23-27 (1973).

[159] Milliken v. Bradley, 433 U.S. 267 (1977).

[160] Milliken v. Bradley, 418 U.S. 717 (1974). The district court had noted that "relief of segregation in the public schools of the City of Detroit [could] not be accomplished within the corporate geographical limits of the city," since the school population at that time was already three-fourths black. Unreported findings of fact and conclusions of law (E.D. Mich. Mar. 28, 1972), quoted in Bradley v. Milliken, 484 F.2d 215, 244 (6th Cir. 1973).

In the late sixties, the community control movement, which originated in Harlem and Bedford-Stuyvesant in New York, attracted many who thought that the problems of segregated schools could be solved by turning over the schools to the black or Hispanic community, which would then run the schools with minority administrators and teachers. In Atlanta, a "compromise" was reached in which further efforts toward integration were abandoned in exchange for the allocation of more administrative positions, including that of superintendent, to blacks.[165] A similar compromise was included in the Dallas plan[166] and the issue has been raised in other cities.

The community control movement was widely studied. After an initial burst of writing hailing the idea as a way out of the impasse of big city school bureaucracies, studies indicated that the actual effect of community control in New York was serious community conflict with no demonstrable educational gains.[167] Nor is there much evidence that minority teachers would be more

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[161] 402 F. Supp. 1096 (E.D. Mich. 1975).

[162] Discussed in *Milliken II*, 433 U.S. at 275, 276 & 294 n.2 (Powell, J., concurring).

[163] *See* discussion of this decision in Yudof, *supra* note 55, at notes 214-226 and accompanying text.

[164] *See, e.g.*, Orfield, *How to Make Desegregation Work: The Adaptation of Schools to Their Newly-Integrated Student Bodies*, 39 LAW & CONTEMP. PROB., Spring 1975, at 315.

[165] Calhoun v. Cook, 362 F. Supp. 1249 (N.D. Ga.), 487 F.2d 680 (5th Cir. 1973). *See* D. Bell, *Waiting on the Promise of Brown*, 39 LAW & CONTEMP. PROB., Spring 1975, at 341, 358-59.

This plan was negotiated by Griffin Bell, Now Attorney General. It was strongly supported by Andrew Young, and by Jimmy Carter (both as governor of Georgia and during his 1976 presidential campaign). Mashek, *What Carter Believes*, U.S. NEWS & WORLD REPT., May 24, 1976 at 18-19, 23.

[166] The district court's 1976 plan called for ratios of 44% Anglo, 44% black, and 12% Mexican American in future top administrative appointments. Tasby v. Estes, 412 F. Supp. 1192, 1219 (N.D. Tex. 1976).

[167] *See, e.g.*, LEVINE, OCEAN HILL-BROWNSVILLE: SCHOOLS IN CRISIS (1969).

Recent elections to select members to the governing boards under the New York legislature's watered down version of a community controlled school system produced very little turnout. Only 8% of the eligible voters went to the polls in 1977, and the candidates endorsed by the United fair to minority children than Anglo teachers. A study of teacher-student interaction in classrooms in the Southwest, for example, found that Mexican American teachers were even more inclined than Anglo teachers to reward Anglo children disproportionately.[168] Preliminary research has failed to find that programs emphasizing the child's language and culture have any significant impact on children's attitudes toward school or even on their attendance rates.[169] It is apparent that minority school administrators confront many of the same problems of politics, union relations, urban social and economic collapse, and class conflict between teachers and low income students that afflicted their white predecessors.[170] Nonetheless, the idea of transferring bureaucratic power to minorities as an alternative to desegregating the students remains very much alive.

V

POLITICS, LITIGATION AND WHITE FLIGHT RESEARCH

Despite the fact that research on alternatives to desegregation indicates that they have little educational impact, such research has been ignored, and the alternatives continue to be promoted. At the same time, research that indicates busing increases white flight has been given close attention. Indeed, some school districts have commissioned this kind of research for use in opposing court-ordered busing.

During the Los Angeles school desegregation litigation, the school district commissioned a survey asking parents whether they would remove their children[171] from city schools if the court were to require a desegregation plan that went beyond the school district's proposed part-time voluntary plan. Since many parents indicated that they would remove their children under such circumstances, the school district tried to introduce this survey as evidence that a mandatory plan would be counterproductive. The St. Louis school district followed the same approach. Governor Jerry Brown illustrated the political value of the issue. He commented that white flight was an inescapable "reality" and used this as reason for attacking the judge in the Los Angeles case:

Federation of Teachers won most of the positions. New York Times, May 18, 1977, § B, at 5, col. 5. Nonpartisan special elections for school board members, however, usually produce a low voter turnout, particularly in poorer neighborhoods. L. ZEIGLER & M. JENNINGS, GOVERNING AMERICAN SCHOOLS: POLITICAL INTERACTION IN LOCAL SCHOOL DISTRICTS (1974).

[168] U.S. COMM'N ON CIVIL RIGHTS, REPORT V: MEXICAN AMERICAN EDUCATION STUDY, TEACHERS AND STUDENTS (1973).

[169] AMERICAN INSTITUTES FOR RESEARCH, *supra* note 151, § VI, at 27.

[170] One dramatic indication of conflict between black administrators and black elected officials was the firing of Barbara Sizemore, the first black woman superintendent, in Washington, D.C., by the majority black school board.

[171] Marylander Marketing Research, Results of the L.A.U.S.D. Survey (1977).

> The philosophers and judges can issue their edicts, but we are a free country, and if people don't like what they see in the schools, they just get in the car and go to a private school, move to Ventura, go to Riverside, go to Orange County and that's exactly what's happening.[172]

One major conclusion of the white flight research—that the most stable desegregation plans are not the limited plans but those that are metropolitanwide[173]—is almost always ignored by policymakers. Although a study of the St. Louis school district came to this conclusion,[174] the issue of white flight was raised instead as an argument for a more limited plan within the city.

Missouri's Senator Thomas Eagleton defended his 1977 break with civil rights groups on the basis of the negative conclusions of some white flight research, ignoring the metropolitan issue. He justified his bill stripping HEW of authority to require busing in urban areas[175] because he was convinced that stable desegregation was impossible in cities with less than 50 percent white students.[176] In Kansas City, he charged, HEW was planning on "sprinkling an ever-dwindling ration of white students among all-black schools."[177] Local civil rights leaders on the Missouri Advisory Committee to the U.S. Commission on Civil Rights replied that if Eagleton's concern was for stable, majority-white desegregation, he should have supported the Kansas City school board's suit for a metropolitan plan rather than attacking HEW's more limited authority to require busing only within school district boundaries.[178] Once again, a policy position was justified on the basis of a selective perception of social science evidence, and a politically-inspired interpretation of its policy implications.

VI

WHAT SHOULD BE DONE?

At a time when consensus on the legal requirements for desegregation and on the desirability of urban school desegregation as a policy have broken down, both better reporting of information on existing research and new research are needed. The best source of information about the effect of school desegregation policies is social science research. Yet a judge or a school official with the best of intentions could not readily untangle the controversies over results of research that now spread across several disciplines, sometimes involving highly technical methodological disputes and at other times, simply ad hominum attacks on the motivations of scholars.

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[172] L.A. Times, July 24, 1977, § 1, at 1, col. 6.

[173] Coleman, *Liberty and Equality in School Desegregation*, 6 SOC. POL'Y 9, 13 (1976). *See* Rossell, *supra* note 94, at 133.

[174] H. Schmandt, G. Wendel, & J. Manns, Government, Politics, and the Public Schools: A Preliminary Study of Three Cities (Sept. 2, 1977) (St. Louis University Center for Urban Programs).

[175] Eagleton-Biden Amendment of 1977, Pub. L. No. 95-205, 91 Stat. 1460 (1977).

[176] 123 CONG. REC. S10902 (daily ed., June 28, 1977).

[177] St. Louis Post-Dispatch, July 24, 1977, § B, at 2, col. 4.

[178] Kansas City Star, Aug. 11, 1977.

The adversary process tends to exacerbate the problem for two important reasons. First, both parties tend to seek not the best but the most predictable witnesses. The primary motivation of the parties is victory, not the discovery of "truth." This means that judges often see a narrow range of witnesses strongly identified with particular policy positions. Such evidence is as likely to deepen confusion as it is to illuminate the choices.

The second problem is financial. Increasingly, school boards are investing substantial sums of money in research designed to support arguments for minimal desegregation. Moreover, they have sufficient funds to make effective use of social science consultants. Civil rights organizations, on the other hand, have never been able to finance such research. And when they can afford consultants, it is usually only to draw up a sketchy "nuts-and-bolts" plan estimating the number of children that would have to be reassigned in order to desegregate the school district.

A more useful approach for a court or other agency dealing with a large city school district would be to create an independent group of experts to respond to questions formulated by the judge or agency. This group could assess the existing research on various issues, initiate short-term research where needed, and report its conclusions. The contending parties should also have access to the data, and the right to question the experts when they submit their report.

This procedure, of course, would not solve all the problems. Where the existing research is inadequate, or where existing findings are unclear or contradictory, all the experts could do is report that there are unresolved questions or that the existing research has nothing of value to say. The independent panel would be useful in pointing out clearly spurious claims or misleading use of data by one or both parties. It could also inform the policymakers of trends and elements of consensus that have emerged from research across the country. The process would not produce a desegregation plan but would give policymakers an opportunity to use social science information more realistically as one element in their decisionmaking.[179]

The contribution that social scientists can make to desegregation policy has been limited in part because of the lack of a national commitment to doing sophisticated research on desegregation during the seventies. Major urban school busing plans have been implemented in the past seven years, yet there is no ongoing national assessment of these plans. Not even the relatively simplistic kinds of data used in the 1966 *Coleman Report* are now being systematically collected. In order to obtain more useful information from social scientists, research—and more adequately funded research—must be undertaken on general urban trends that will shape the context within which desegregation issues should be considered. Congress should direct HEW to initiate a long-term multidisciplinary assessment of the desegregation process to gain an understanding of the conditions under which desegregation works best.

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[179] Courts could enlist social science experts in improving the process of monitoring compliance with court orders. Well designed survey research of students and teachers, for example, would provide a valuable supplement to school district reports and the observations of monitoring committees.

Those federal agencies that have sponsored research and evaluation studies recently[180] have done a poor job of disseminating them to the academic community. This research, which contains important evidence of some of the factors that make desegregation succeed or fail at the school level, has not had much impact on policymakers or the academic research community. The first step—federally-sponsored conferences, seminars, and workshops on these and similar studies—would be useful both in expanding ways of thinking about the desegregation process and generating discussion that could help shape priorities for a national assessment of the desegregation process.

The second step is to initiate research on the relationship between the effects of school desegregation and other urban policies. Federal and local housing authorities in several communities have been found guilty of intentionally segregating portions of the housing market. As the courts attempt to remedy both kinds of segregation and as civil rights groups, in order to prove a constitutional violation in a school desegregation case,[181] use evidence that neighborhoods were intentionally developed in a way that guaranteed segregated schools, research on the interaction between governmental housing and school policies is needed. Such research might also aid in shaping mutually reinforcing remedies for both segregated schools and housing.

If research is to play a more useful role, researchers must recognize that some of the serious wounds of the recent controversies have been self-inflicted. Researchers who find themselves in the unusual and understandably gratifying position of being asked for advice on issues of general social policy often express their general value preference, though it may go far beyond the boundaries of existing research. Policymakers and journalists frequently do not understand the limitations of existing research and press for advice where no reliable information exists. On receiving information, they seldom sort out the components that rely on research evidence, those that express the researcher's current hypotheses, and those that merely reflect his value preferences as a citizen. Social scientists must operate with full awareness of these problems and make every effort to separate their roles as clearly as possible.

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[180] *See, e.g.*, G. Forehand, M. Ragosta, & D. Rock, *supra* note 49. J. Coulson, National Evaluation of the Emergency School Aid Act (ESAA) (System Development Corporation, Santa Monica, 1976). The Coulson study was the first of a series of evaluation studies that studied the effect of desegregation in a sample of schools across the country over time.

[181] *See* Taylor, *The Supreme Court and Recent School Desegregation Cases: The Role of Social Science in a Period of Judicial Retirement*, 42 LAW & CONTEMP. PROB., Autumn 1978 at 37.

At best, the relationship between academics and policymakers will be difficult. Selective perceptions of research findings and politically inspired misuse of data will continue. Careful, self-conscious handling of a complex set of responsibilities and a variety of audiences is essential to useful participation by social scientists in the policy arena. Judges and other public officials must have a more realistic understanding of the way academic researchers operate and the kinds of advice they are best equipped to provide. Developing a better relationship will require important changes in procedures and expectations. It is, however, the only way substantially to improve the quality of evidence available for making wise decisions about the future of race relations in enormously complex urban settings.

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School Segregation and Housing Policy: The Role of Local and Federal Governments in Neighborhood Segregation

Gary Orfield

School officials always ask why they should be required to cure problems of segregation that are, in part, due to housing policies. After a desegregation plan is implemented they often find that they still must cope with the racial consequences of housing and development decisions that may suddenly and drastically alter the enrollment patterns in part of a school district. It is obvious to virtually all participants in the school desegregation process that housing policies have an impact on schools, and that school segregation or desegregation may have an impact on housing choices.

Early in the task of designing the school desegregation plan, as a court-appointed expert in the development of St. Louis desegregation, I met with officials from the city's Community Development Agency. Since the court order specified that residentially integrated communities could be exempted from busing, I asked whether there were plans to construct subsidized family housing (largely tenanted by blacks in St. Louis) in any of the city's segregated white attendance areas. There were none. Therefore, it was necessary to include all of these neighborhoods in the mandatory desegregation plan. Around the same time I looked at a number of the black schools under consideration for mandatory reassignment. In several cases it was possible to see subsidized family housing within view of the school yard. The federal government was paying for all-black housing on sites selected by local officials, sites which guaranteed segregated education. The cost of transporting students from those projects to the desegregated schools is a direct outgrowth of the decision to build ghetto housing. Achieving stable school integration requires an understanding of the dynamics of housing policies and the development of future policies that aid rather than retard stable integration.

This paper will consider the following issues:

1) The degree to which the segregation of the schools may be related to housing decisions by officials in the city and the suburbs,
2) The extent to which decisions of this nature are still made today,
3) The possibility that existing housing and development plans may produce segregation in schools that are integrated under the new plan,
4) Types of cooperative school-housing relationships that could strengthen desegregation plans,
5) Long-range issues for the city,
6) Issues in the suburban sectors of the housing market, and
7) Recommendations.

Public Policy and the Development of the St. Louis Ghettos

St. Louis has always had black residents, even in the days of French and Spanish rule, but the development of a large and highly segregated black population in the city and certain suburbs is largely a twentieth-century phenomenon. Government decisions and actions, both local and national, have had a strong impact on the city's racial patterns.

Although the city was 25 percent black in 1830, the number fell to a low of two percent in 1860, in part because of the attraction of the free state of Illinois across the river and in part because a number of state laws restricted black property ownership, imposed other strict limits, and made it illegal to educate blacks, even the free blacks who paid taxes for the operation of public schools. Even after the Civil War the black population remained relatively small, about six percent until 1910. As the numbers grew to 44,000 in 1910, segregation increased. Restrictive covenants forbidding the sale of property to blacks, enforceable in local courts, were begun in 1911.[1] "In a city-wide referendum in 1916," Norbury L. Wayman reports, "St. Louis became the first city to vote mandatory residential segregation into law."[2] Although the law was overturned in the courts and the Supreme Court rejected such explicit zoning by race in a parallel case from Louisville, the statute was a reflection of local attitudes.

Segregation in the city began to rise rapidly with the great migration of blacks to the city spurred by World War I. The war, which cut off the supply of immigrant labor and created a very severe industrial labor shortage, spurred active recruitment of Southern black workers, workers who were at the same time being pushed off the land by crop failures in the South. One reason for the black exodus to St. Louis and other cities, according to a leading contemporary student of the migration, was education. One reason "universally given" for leaving the South, according to Emmett J. Scott, was "the inability to educate their children properly."[3] It was during the period of this migration that the modern ghetto system began to develop in many of the nation's large cities.

When the migrants arrived in St. Louis, they found a city with many kinds of state-required segregation. The city had separate schools, separate parks, and separate restaurants and theaters.[4]

World War I brought a sudden increase of perhaps 10,000 people in St. Louis's black population at a time of very heavy and violent pressure for segregated housing. St. Louis was also directly across the river from the site of the worst race riot to grow out of the great migration (in fact, the worst race riot of the twentieth century), the July 1917 riot in East St. Louis, Illinois, which saw the virtually unpunished burning of 16 blocks of black homes and the killing in cold blood of dozens of blacks who received no significant protection from local police. The East St. Louis riot was related to the expansion of black housing into white areas and it created a national atmosphere of terror, reinforced by dozens of racial bombings in major cities. After the riot thousands of refugees walked across the bridge to St. Louis and many settled in segregated housing there. President Wilson refused appeals for a federal investigation of the riot.[5]

The development of the St. Louis ghetto was graphically described in 1920:

> There are about six communities in which the negroes are in the majority. Houses here are as a rule old. . . . Before the migration to the city, property owners reported that they could not keep their houses rented half of the year. According to the statements of real-estate men, entire blocks stood vacant. . . . Up to the period of the riot in East St. Louis, houses were easily available. The only congestion experienced at all followed the overnight increase of 7,000 negroes from East St. Louis, after the riot. . . . New blacks have been added to all of the negro residential blocks. In the tenement district there have been no changes. The select negro residential section is the abandoned residential district of the whites. Few new houses have been built.[6]

Residential segregation became far more intense in the city. In 1910, the statistics showed that 54 percent of the blacks in St. Louis would have had to move to white areas to achieve random distribution of population by race, a figure like that of certain other immigrant communities. By 1920, however, the figure rose to 62 percent and by 1930 it shot up again to 82 percent. The level reached 93 percent in 1950 and 91 percent in 1960.[7]

The city developed a strong pattern of residential expansion by blacks only on the boundaries of established black residential areas. These expansions always led to resegregation and expansion of the ghetto. A study covering the 1930-1960 period, for example, identified no stable interracial areas in the entire city.[8] It became the norm for blacks to be segregated in virtually all black neighborhoods and for integrated neighborhoods to always become part of the ghetto.

History of St. Louis Housing

St. Louis has one of the largest municipal public housing efforts and one which has included some of the most unsuccessful housing projects in the nation. The program has been continuously under criticism in recent years. Even after national hearings and investigation by the U.S. Commission on Civil Rights in St. Louis on the question of housing segregation, the city has continued to receive substantial amounts of federal money to build segregated family housing. Since the initiation of housing programs, the vast bulk of subsidized family housing for the entire metropolitan area has been built in the black areas of St. Louis. Much of the rest is in black suburban areas. That pattern continues today and existing plans assure that it will continue into the future for at least several more years. These patterns insure that many of the most educationally deprived and poor children of the metropolitan community will have to be transported to school if they are not to attend schools that are severely segregated by both race and class.

The St. Louis public housing record includes perhaps the most infamous housing project in the nation, Pruitt-Igoe, which opened in 1954 with 33 high-rise buildings containing almost 2,800 apartments. Within five years the project had become a notorious scandal. Both a local grand jury and a committee appointed by the mayor were soon investigating its problems. It came to represent the worst mistakes in public housing, the most intense pathological kind of separation. A study by Washington University Professor Lee Rainwater concluded:

> . . . no other public housing project in the country approaches it in terms of vacancies, tenant concerns and anxieties, or physical deterioration. Rather, Pruitt-Igoe condenses into one 57-acre tract all of the problems and difficulties that arise from race and poverty and all of the impo-

> tence, indifference, and hostility with which our society has so far dealt with these problems. . . .
>
> Pruitt-Igoe houses families for which our society seems to have no other place. The original tenants were drawn very heavily from several land clearance areas in the inner city. . . . Only those Negroes who are desperate for housing are willing to live in Pruitt-Igoe. . . .[9]

In 1965, although the project was one-fourth empty, almost 7,000 children lived in Pruitt-Igoe. All were black, most without fathers, most depending on welfare, and most in families with an average per capita income of less than $500.[10]

Dean William Moore, Jr., of Forest Park Community College studied the impact of the Pruitt-Igoe project on the education of the children who grew up in his book, *The Vertical Ghetto: Everyday Life in an Urban Project.*

> The enrollment of many schools quadrupled, but at the same time, there was a compactness of the area from which the children were drawn. Never before had an entire school district's population come from the families that could be housed within one square block. In some cases, the neighborhood school drew its complete enrollment from three buildings. . . .
>
> In numerous cases, one could find more children attending a single elementary school located near an inner-city housing project than comprising the combined enrollments in three elementary school districts located in suburban communities. Patchworks of new schools were constructed around the housing projects, but the busing of school children was frequently necessary to alleviate the overcrowded conditions.[11]

The children who grew up in this federally subsidized, locally designed setting faced a situation of overcrowding, constant physical danger, filth, noise through the day and night, and nothing but evidence of failure in their community and among the families represented in their school. Such a child "lives among thousands of teenagers, high school dropouts, and high school graduates who cannot find employment."

The nature and reputation of the project, of course, has impact on the decisions of teachers to work in the project schools.

> They have heard the rumors about the notoriety and infamous reputation of the housing project. . . . These rumors and descriptions convince many teachers that a school . . . is not one in which they would like to teach. Teachers have also heard about the conditions in the housing project. This hearsay, too, convince many of them that they should look for teaching assignments elsewhere.

St. Louis and its suburbs constitute a single housing market. Thus the public policies on housing and development of both the city and the suburbs may affect the residential options and preferences of both blacks and whites, and thus the pattern of enrollment by race in various neighborhood schools and school districts across the metropolitan area. There is considerable evidence to sustain the conclusion that public policies have had the following impacts on St. Louis residential patterns:

1) To concentrate low-income blacks in the city and a handful of suburbs that are traditionally black or adjoin city ghettos,
2) To remove small black settlements in several suburbs,
3) To subsidize the expansion of the ghettos by financing the large-scale movement of low income blacks into integrated neighborhoods, producing resegregation,
4) To exclude many blacks from home purchase in older suburbs because of restrictive covenants and FHA policy on segregation,
5) To exclude many minority families because of exclusionary zoning which prohibits subsidized housing, multiple-family-unit construction, and moderate price single-family homes (given the lower income of blacks, their lack of access to jobs, and their lack of equity because they have either been denied access to home ownership or forced to purchase a home in an area where property did not inflate rapidly enough to create a large equity), exclusionary policies which drive up the cost of housing and have a clearly disproportionate racial impact, and
6) To encourage dispersion of housing and job locations to outlying suburbs through construction of freeways and tax policies that have favored new construction.

These impacts on residential patterns have had profound impacts on school enrollment.

At the same time there are a series of public policies and social facts about the schools which may well have produced residential change. The fact, for example, that the St. Louis city schools have the lowest state classification in the metropolitan area must have an influence on families deciding where to settle. A study of white migration from University City found the schools to be the most important factor in the decision to move out. (The schools were undergoing rapid racial change in individual neighborhoods.) The names of individual suburban school districts constantly appear in St. Louis real estate ads, indicating that the experts in the real estate market consider schools to be a very major force in residential choice. A study now in process of 16 metropolitan areas has found that virtually all newspaper ad mentions of schools or school districts refer to schools or districts that are virtually all white.

Housing Policies in the Sixties and Seventies

During the late sixties and early seventies housing policies and practices relating to racial segregation received more searching scrutiny in the St. Louis area than in perhaps any other metropolitan community. The Supreme Court's leading decision on fair housing, *Jones* v. *Mayer*, 392 U.S. 409 (1968) came on a case arising in a St. Louis County suburb. It arose when a couple (both career employees in federal civil service) were rejected when they attempted to buy a new house in a Paccock Woods subdivision planned for 1,000 people. Among the allegations they raised in court was the argument that this rejection would have the effect of excluding their children from the local school district. (*Jones* v. *Mayer*, 379 F. 2d 33 (8th Cir. 1967)).

The St. Louis housing programs were examined by the National Commission on Urban Problems in 1968 and in the first large hearing on suburban exclusion by the U.S. Commission on Civil Rights in 1970. The next year the St. Louis housing programs were included in the Commission's 1971 report on segregation in the Section 235, low-income home ownership program. St. Louis County was also the site of the Justice Department's first lawsuit against suburban land use practices excluding subsidized housing, the *Black Jack* case. There were, at the same period, important pieces of research being conducted about the impact of public housing in the city and the process of racial transition that was beginning to afflict some of the inner suburbs. Mistakes in housing programs were investigated and exposed more comprehensively in the St. Louis area than in virtually any other city.

A study prepared for the National Commission on Urban Problems concluded that the suburban governments had adopted zoning practices which had driven up the cost of suburban housing, excluding low and moderate income families from the newer areas. One of the zoning considerations which was explicitly raised in some communities was the desire to avoid paying the educational costs of many moderate and low income families. The affluent Parkway school district, for example, favored a zoning policy that would only permit construction or homes costing about twice the average cost in the metropolitan area. The net effect of policies like this, of course, was to exclude many minority and low income families and to force other communities (the city and the inner suburbs) to absorb the school costs with a much weaker per child tax base. The then mayor of St. Louis, Alfonso Cervantes, testified to the National Commission:

> Over the last 10-12 years, we have lost 450-some major industries. We lost three to four thousand small businesses. . . . The suburban and the rural areas have all types of tax concessions and bond issues and promotional plans. . . .
>
> So it leaves us, really, with the ill and sick and poor, and people who are not trained. . . .

The Civil Rights Commission staff concluded in 1970 that federal programs in St. Louis "have not only failed to eliminate the dual housing market for black and white families but have had the effect of perpetuating and promoting it." Between 1962 and 1967, for instance, the Federal Housing Administration found that blacks had been able to buy eight-tenths of one percent of the new suburban housing it insured on a large scale in the county.

The housing subsidy programs in the county operated on a highly segregated basis. Although the city of St. Louis had one of the nation's largest public housing programs, the only units built for families in the suburbs up to 1970 were in the black suburb of Kinloch, which built 150 units for black families.

St. Louis county had first applied to the federal government for authority to build 600 units of public housing in 1956 but opposition prevented the construction of any. A HUD review of the county's program in 1963 observed that the county did not want to build subsidized housing "for fear low-income families will move from the city." Not until 1969 did the county reactivate its effort, asking for 600 units for construction and 100 leased. All of the leased housing was planned for a black area as were two of the proposed turnkey sites. Of the remaining three, one was to be only for elderly families. At the same time, HUD had approved 2,800 more units for the city, which had massive vacancies in existing public housing, with the new units concentrated in black areas.

Later the large new 1968 program for low-income home ownership, Section 235, which was created as the central reform of the 1968 housing act, was implemented in a segregated fashion in St. Louis. The new housing in the program was built in segregated black areas and more than 85 percent of all the Section 235 existing housing sold through the program in the metropolitan area was in black or transitional areas. Many of the homes were old (the average was 42 years old), in poor condition, and priced speculatively.

In examining the 235 program in St. Louis, the Civil Rights Commission staff found that 86 percent of the existing homes were in black or changing neighborhoods, that many were old, defective, and sold by a large speculator. They were typically sold to a female-headed family with an average of four children. The impact on schools is obvious.

The urban renewal programs hurt blacks. More than three-fourths of those displaced by city projects and the large majority displaced in county renewal efforts were black. People displaced by renewal help extend the ghetto into outlying city communities and inner suburbs. When HUD demanded plans for relocation of displaced families from suburbs, the plans often specified public housing in St. Louis as a place where displaced poor minority families could live. Webster Groves, Olivette, and Elmwood Park were among the communities which pointed to St. Louis projects. The plans, in other words, called for using federal renewal funds to raze black homes, federal relocation funds to move the families to the city, where more federal housing dollars would subsidize the conversion of the suburban land to some use the suburban majority preferred. Eventually, a federal court would have to order the expenditure of still more public funds to move the children affected from the segregated schools near the project.

Another basic source in the relocation plans were the transitional neighborhoods. In a metropolitan area where stabilization of integrated neighborhoods was almost unknown, the plans approved by HUD called for putting "displaced black families" into the mixed areas, thus, according to a Commission on Civil Rights investigation, "forcing black families into the central city or promoting the creation of new segregated neighborhoods throughout the metropolitan area."

The construction of subsidized housing in the county has continued to lag very seriously to the present, while HUD has pushed the city very hard to accelerate its subsidized program, which is building virtually all of its family housing in areas with all-black school enrollment. The few units being developed in white areas (as well as those in black areas) have a neighborhood preference procedure for marketing which means that they will do little or nothing for the school segregation problems. Neither the city nor the county has any counseling program, like that in Chicago or Louisville, which encourages families to consider moves to areas where their children can walk to well integrated schools.

The Missouri Advisory Committee to the U.S. Civil Rights Commission concluded in 1972 that in the county "it is almost impossible to develop new housing for low income persons in the county because of restrictive zoning, racial prejudice, and political pressures to keep out low-income people and blacks." Eight years later, a report for the regional planning agency, the East-West Gateway Coordinating Council, reported that there were 4563 applicants on the waiting list for subsidized housing even though there had been very little publicity about the existence of the program. Gary Tobin reported that zoning practices had not only stopped public housing but also had prevented the construction of private family rental housing, which would be subsidized for poor people under the federal rent subsidy program. The report concluded that the best way to meet the housing need would be to construct new units but that zoning and local politics made this almost impossible:

> Sites can be chosen throughout the County, the units can be designed to provide a good mix for all groups, and the costs can be partially covered with Community Development funds or through the involvement of the private sector.
>
> However, so little vacant land is zoned multi-family and available for development of subsidized housing that this option is very difficult to implement for political reasons. Vacant land is available . . . but this land would have to be rezoned. . . .

Given this situation, Tobin concluded, segregation would have to be accepted and some way would have to be found to rezone some land "or large families will receive little, if any, housing assistance in St. Louis County."

Although little subsidized family housing has been built in the county, much of what there is is located in black areas where the children must attend segregated schools or be bussed elsewhere. In 1980 there were, for example, five subsidized developments in University City, two in tiny Wellston with its virtually all-black unaccredited school system, and five in the all-black community of Kinloch, which the federal court was forced to merge with adjacent white systems to achieve school desegregation.

The city of St. Louis, in striking contrast to the county and the outlying metropolitan counties, maintains a large subsidized family housing program which has recently been accelerated. In 1978, in spite of the earlier destruction of large parts of Pruitt-Igoe, there were almost 8,000 subsidized family housing units in the city, housing perhaps a tenth of the black families of the city in places where their children can walk to segregated schools. There is, of course, a critical need of city families for more housing in decent condition, given the fact that 29 percent of the units in the city were rated as substandard. HUD pressed the city hard to speed up housing production when reviewing its administration of the federal Community Development program in 1978.

Housing construction sped up. The city reported in its 1980 Community Development application that it had committed funds for 1,559 units for families and 1,316 units for large families. "In the short period of one year," the city agency reported, "the once dormant City housing industry is now in full swing. Since June of 1978, the City has produced 4,515 housing units, 1,260 through new construction and 3,255 through rehabilitation." While the county efforts were stalemated, the city was building and rebuilding, once again in areas where there were nearby all-black schools.

Housing and urban development policies and programs have unquestionably contributed to the development and expansion of segregated public education in St. Louis and its suburbs. The net impact of these programs today is probably to continue to work against integrated education. With the exception of a few areas in the city undergoing restoration and a few suburban areas trying to stabilize integrated populations there are no signs of commitment to integration as a policy. Without altered policies there is little doubt that the existing housing programs could contribute to resegregating some of the schools integrated under the St. Louis desegregation plan.

Housing policies have effects which reach across school district and municipal boundary lines and housing policies have done much to make school segregation the vast metropolitan problem that it is in St. Louis today. Although neither the housing agencies nor the suburbs are parties to this litigation they cannot be unaware that their housing practices will be in the forefront of the metropolitan litigation that has been announced. This litigation is bound to be protracted and there will be time to improve the present record. Suburban officials who sincerely believe in the value of naturally integrated neighborhood schools and who denounce the possibility of mandatory, cross-district transportation should take this opportunity with the greatest possible seriousness.

Within the city, I believe there is much to be gained, both by the school district and by the city if a cooperative administration of school and housing policy can be developed. If integrated schools are disrupted by inappropriate housing policies the city will lose people and resources as neighborhood resegregation occurs and the school board will be faced with difficult and sometimes disruptive adjustments in its desegregation plan. If, on the contrary, the city policies were to aim at stabilizing and expanding the number of integrated neighborhoods, those communities could be rewarded by exemption from busing, the school district could save money, and doubtless the neighborhoods would become more attractive to families and investors. The new plan will produce integrated schools next fall in virtually all the city areas which have had some residential integration but retained all-black schools. If the city and the developers it works with could help publicize the new opportunities to potential buyers and renters it could help the city capture some of the black and white middle class families it has lost and badly needs. It might help hold the young white families in these areas who often leave for the suburbs when their children reach school age. The following policies would be very useful:

1) careful consultation by the Community Development Agency with the Board of Education about the desegregation plan implications of projected family housing construction,
2) administration of the rent subsidy program (Section 8) with counseling intended to prevent federally subsidized transition of neighborhoods and to increase residential integration,
3) development of plans for stabilizing integrated neighborhoods,
4) city publicity work in redevelopment areas about newly integrated and magnet schools and an attempt by neighborhood planners to incorporate school issues in their work, and
5) city formulation of concrete and actively promoted proposals for regional fair share and housing opportunity plans including the entire Missouri portion of the SMSA.

Although the court has no grounds to issue an order on these issues, I believe that the U.S. Department of Justice could very appropriately bring these issues to the attention of the Departments of HUD, Education, and Treasury (revenue sharing), which could then urge that such cooperation be very strongly encouraged in the administration of the federal grant programs that finance a great deal of local government activity. For decades, federally financed, locally administered housing, education, and civil rights programs have often been working at cross purposes in St. Louis, creating part of the problem that the court confronts today. It is time that they begin to contribute to a solution.

Notes

[1] Wayman, Norbury L., "Demographic Trends of the Black Population of St. Louis," unpublished, July 1977.

[2] *Ibid.*

[3] Scott, Emmett J., *Negro Migration During the War*, reprint edition, (New York: Arno Press, 1969), p. 18.

[4] Scott, p. 95.

[5] Rudwick, Elliott M., *Race Riot at East St. Louis, July 2, 1917* (Cleveland: World Publishing, 1966).

[6] Scott, pp. 197-198.

[7] Taeuber, Karl E. and Alma F., *Negroes in Cities: Residential Segregation and Neighborhood Change* (New York: Atheneum, 1969), pp. 40-54.

[8] *Ibid.*, pp. 106-110.

[9] Rainwater, Lee, *Behind Ghetto Walls: Black Family Life in a Federal Slum* (Chicago: Aldine, 1970), pp. 9-10.

[10] *Ibid.*, p. 13.

[11] Moore, Jr., William, *The Vertical Ghetto: Everyday Life in an Urban Project* (New York: Random House, 1969), pp. 5-6.

[12] *Ibid.*, pp. 52-53.

[13] *Ibid.*, p. 202.

[14] U.S. Commission on Civil Rights, *Hearings, St. Louis, Mo.*, 1971.

[15] Sutker, Solomon, and Sara Smith Sutker (eds.), *Racial Transition in the Inner Suburb: Studies of the St. Louis Area* (New York: Praeger, 1974), Charles L. Leven, James T. Little, Hugh O. Nourse, and R. B. Reed, *Neighborhood Change: Lessons in the Dynamics of Urban Decay* (New York: Praeger, 1976).

[16] Commission on Civil Rights, *Hearings*, p. 538.

[17] Testimony before the National Commission on Urban Problems, *Hearings*, Vol. 5, October 1967, p. 182.

[18] Commission on Civil Rights, *Hearings*, p. 259.

[19] *Ibid.*, p. 260.

[20] *Ibid.*

[21] *Ibid.*, p. 547.

[22] *Ibid.*, p. 548.

[23] *Ibid.*, p. 260.

[24] *Ibid.*, p. 559.

[25] *Ibid.*, pp. 568-569.

[26] *Ibid.*

[27] These conclusions are based upon the author's reading of the city's community development proposals and reports, interviews with members of the Community Development Agency staff and local housing policy activists and planners including Tim Barry, Director of Planning, East-West Gateway Coordinating Council; Bob Brandhorst of the City Council staff, Harry Berndt of Metropolitan Housing Resources, and Carl Fox of the Mayor's office. The interpretation of the facts they conveyed is, of course, my own.

[28] Missouri Advisory Committee to the U.S. Commission on Civil Rights, "Jobs and Housing in St. Louis," June 1973.

[29] Tobin, Gary, with the assistance of Jeff Pearson, *Subsidized Housing in St. Louis County* (St. Louis: East-West Gateway Coordinating Council, 1979).

[30] *Ibid.*, p. 46.

[31] *Ibid.*, p. 48.

[32] Data attached to letter to author from Tim Barry, East-West Gateway Coordinating Council, April 24, 1980.

[33] City of St. Louis, "Application for 1979 Community Development Block Grant Funds," October 1978, pp. 5-6.

[34] City of St. Louis, "1980 Community Block Grant Application," October 1979, p. 8.

[35] *Ibid.*, p. 11.

[From the St. Louis Post-Dispatch, June 7, 1981]

YEAR IN REVIEW—DESEGREGATION FARES WELL

(By Sally Bixby Defty)

St. Louis schools survived their first year of court-ordered desegregation with no major violence, with evidence of general improvement in test scores, with scattered signs of improving racial attitudes—and with some reason to expect next year to be better.

Interviews with administrators, teachers and students in recent weeks showed a wide spectrum of opinion on the year that was. But these facts were clear:

Scores on tests that measure achievement during the year were the best in more than a decade. This occurred despite the upheaval caused by desegregation and the simultaneous conversion to a system of middle schools for grades six through eight.

The student body went from 76 percent black to 79 percent black, and yet 156 whites from outside the city have already applied to go to the city's magnet schools next year.

The faculty underwent an unprecedented shuffling to meet racial guidelines; yet faculty attendance improved from the year before. Student attendance, despite massive relocations, remained at the same levels as in recent years.

For St. Louis and its school children, the most important thing about the year that ended last week is there was no major outbreak of violence. "It was just an average year," said Sam Miller, head of security for the schools.

Capt. William Relling heads the police department's juvenile division, the officers that Miller's guards call in case of serious troubles—robberies, assaults, extortions.

Relling said the year "was one of the best in the 20 years I have been working with juveniles and the schools."

Complaints by white girls at Cleveland High School about sexual harassment by blacks triggered a boycott of classes in mid-September.

Interviewed recently, one of the girls, said, "After the first couple of months, everything was fine. I guess the black kids were just mad at having to go to another school and were taking it out on us." She did not want her name used.

Stephanie Vaughn, a black sophomore at Cleveland, was struck on the head by a brick that crashed through a window of the bus taking her home to the North Side in early October. Four other black students were injured.

"There was no more trouble after that," she said recently. "I had a good year at Cleveland, just like the year before back at Vashon. It was fine."

Nevertheless, the year was a wrenching experience—not only for blacks and whites bused from the schools they would normally have attended but also for those left untouched by desegregation as well.

The system established 23 middle schools for children in grades 6 through 8, which meant—even in all-black schools—that youngsters from as many as five elementary schools found themselves flung together in a new setting.

Perhaps most important of all, teachers underwent an unprecedented number of transfers—1,500—to comply with the court's order that the racial balance at each city school must be within 5 percentage points of the staff racial ratio for the district as a whole; 64 percent black and 36 percent white.

Given all this, preliminary faculty attendance figures for the year are little short of remarkable. Last year, staff members had an average daily absentee rate of 4.61 percent; this year the rate of absenteeism fell slightly, to 4.46 percent.

Among elementary school children, the absenteeism rate fell a fraction of a percent from last year's average of 8.4 percent. In the two preceeding years absenteeism had been far higher, above 10 percent, possibly due to severe winters.

Only among high school students did absenteeism show an increase over last year, rising to about 16 percent compared with last year's rate of 14.1 percent. In the 1978-79 school year, however, absenteeism was 16.7 percent, so this year's rate is not without precedent.

Not only did students show up, but their performance on standardized achievement tests improved. For example:

More eighth graders passed all three sections of the state Basic Essential Skills Test than last year. This year, 45 percent passed; last year, the total was 43 percent. City schools, however, again had the lowest scores among 24 school districts on the Missouri side of the metropolitan area.

Scores on the California Achievement Test rose between fall and spring for every grade (kindergarten through 12) and in every field of academic accomplishment. That record marks a complete reversal of the steady decline in test scores that occurred between 1971 and 1978. It was even better than last year, when that long trend was first reversed.

Even the actual cost of the first year of desegregation proved cause for a sigh of relief. Against the estimated cost of $22 million, "we have about $2 million unspent," said John Lanig, executive director of financial administration for the district. "We couldn't do all the renovation, and getting some programs underway took a long time."

Tardiness in getting things going constituted perhaps the most serious problems of the first year of desegregation.

The enrichment programs in reading, writing, science or mathematics promised to black North Side youngsters left untouched by desegregation did not get underway until late in the school year. The new facilities promised for the new middle schools did not materialize until spring.

And overcrowding—based largely on a mistaken belief that black enrollment would drop at the same rate as white—was so severe on the North Side that seven schools out of the 27 scheduled to be closed under the desegregation plan had to be partially or completely reopened. Equipment for those schools had to be returned from storage.

The changeover to middle schools had long been sought by city educators. A middle school provides children in grades 6 through 8 with facilities never found in kindergarten-through-eighth-grade elementary schools.

Among those are libraries, industrial arts and home economics facilities, laboratories and showers, lockers and dressing rooms.

But the conversion of 23 of the best-equipped elementary schools into middle schools caused a multitude of problems.

After presiding at her eighth graders' graduation last week, Corneda Flowers principal of Blow Middle School, told how it went. "The administration just didn't realize that you need big rooms for shop and homemaking," she said. "They took the number of rooms in the school, multiplied that by 30 to a room and sent you that number of kids."

The result: "The teachers had to give up their lounge for a classroom, there was lunch served in the typing room, the counselor had to be in another building and the behavior-disorder class was in a 9-by-12 closet—and those kids really need elbow room."

Despite the overcrowding in the newly integrated school at 516 Loughborough Avenue where 40 percent of the students were bused in from other neighborhoods, Miss Flowers said the year went well.

"We had 80 black kids and 20 whites go on a field trip to Chicago with two black teachers and one white parent," she said.

"This, from Carondelet? The white parent told me she had never had a more rewarding trip."

At Williams Middle School in North St. Louis, the home-economics room did not get its stoves until close to the end of the school year, and the sewing machines are only now being installed by the manufacturer.

The situation was duplicated at many other middle schools, according to the Desegregation Monitoring and Advisory Committee—interested citizens who repeatedly checked on each school.

Next year, all middle school spokesmen emphasized, everything will be ready to go on opening day.

All the enrichment programs for black youngsters like those at Williams, 3955 St. Ferdinand Avenue, also are expected to be ready to go in the fall.

"We chose creative writing for our enrichment program," said Edwina Harris, "and it has been dynamic."

"We even got a photographic darkroom to go with it. These kids come from five different elementary schools, five different communities. The middle school is becoming the melting pot for education in St. Louis, and it is working," she said.

Enrollment for the district as a whole fell from 61,892 last October to 59,548 at the end of school. School officials are predicting 57,917 next fall, down 5,095 from the projection of 63,012 for this year.

Last spring the total school population was 76 percent black; by this May it had become 79 percent black.

All four of the integrated high schools—Cleveland, Roosevelt, Soldan and Southwest—finished the year more heavily black than had been proposed under the court ordered plan. Soldan, for example, ended up 65.3 percent black even though assignments were made last August to have the student body only 39 percent black.

Southwest was 38 percent black last year and finished the current year 51 percent black but not too much of a change in numbers but a significant shift in something more important, according to Marvin O. Koenig, principal.

For several years, about 500 North Side blacks have gotten permissive transfers so that they could go to Southwest. "They were very highly motivated students," Koenig said. "And they are back this year. But there are also assigned blacks, who were not as well prepared or as highly motivated. There was a difference," Koenig said.

"Because of the street element that has been transferred in, some black parents who have gotten permissive transfers for all their kids to come to Southwest now plan to put their younger kids in private schools," he said.

One of the private schools that opened last fall, United Community in Christ, reported that some parents found they could not afford the cost of private education and took their children out.

[From the St. Louis Globe-Democrat, June 6-7, 1981]

DESEGREGATION YEAR 1: "ALL IN ALL IT WAS ONE OF OUR BEST YEARS"

Bill Smith wrote this story with information he gathered along with fellow Globe-Democrat Staff Writers Jeanne Moore, Donald I. Hammonds and Albert L. Schweitzer.

It began on a beautiful, balmy late-summer morning last September, under the same probing, searching magnifying glass that always accompanies these things.

It began with reporters, dozens of them, at the bus stops, aboard the just-washed, dandelion-yellow buses and in front of the old brick high schools—men and women with notebooks and cameras, with cheap, throwaway pens in hand, waiting for something to happen—for something to go wrong.

It began with the faces of children stiffened in nervous anticipation and with city police stations heavily staffed in expectation of the worst. It began with prayers and calls for peace, and with principals in striped ties, mouths bent into worried but friendly smiles.

For St. Louis Public Schools pupils, the first year of school desegregation ended this week, almost exactly nine months after it had begun. The reporters were gone, the buses were a bit dustier and the nervousness was washed away by time and the anticipation of summer vacation.

It had been, all things considered, a very good year.

From Cleveland High School on the city's South Side, north to Soldan, from Long Middle School on Morganford Road to Banneker Elementary on Lucas, the first year concluded without fanfare. A few firecrackers, talk of summer parties and teen-age love, of '68 Mustangs and bicycles and swimming pools. And a feeling of exhilaration that can only come from knowing that history books and essay tests can be forgotten for a while.

Here was 9-year-old Ancel Johnson, a small, soft-spoken black third-grader who had attended Dunbar School as a second-grader, but was bused to Banneker this year. And here, too, was Ancel's best friend, Timmy Lombardo, a brown-haired, brown-eyed white 10-year-old.

"Ancel's dad is an artist," Timmy said. "And he knows how to draw real good. Me and Ancel are best friends."

"I've made a lot of friends, but Timmy's my best friend," agreed Ancel. "I've known him since I came here. He helped me a lot and I helped him a lot."

At Soldan High School, where classes ended Wednesday morning, junior Kevin Nobles, a black, echoed the thoughts of many of his black classmates.

"We thought there would be a lot of violence—from the troublemakers on both sides. At first I didn't want them (whites)," Nobles said, "but then I saw things working out. Everyone's accepted them now.

"Next year, there'll be more participating, now that they've seen it's working out."

And from Chris Polczynski, a white student at Cleveland who will be a senior next year:

"In the beginning of the year I didn't know what was going to happen, but it's really freaked me out.

"I've met so many new people—so many things have happened. Last year I was a nobody—but this year things have been totally different."

It was not all good times and tranquility, though, in the city's public school system this year. There were periods, in fact, when there were very real concerns that the whole thing was beginning to break apart at the seams—concerns that the delicate threads that held this grand scheme together were being strained to their limits.

Like those difficult times from mid-September to early October at Cleveland High School—days marred by white-black fights, racially instigated name-calling and student boycotts.

"We aren't going to quit until they (blacks) all go back to North St. Louis," said one white, shirtless boy in September. On Oct. 6, near the height of problems at Cleveland, Principal Albert L. Reinsch was relieved of his post.

"I knew that the planning was done as well as we could do it," Superintendent Robert E. Wentz remembered. "But I knew, too, that you can put plans down on paper, you can discuss it, but things don't always turn out the way you'd like.

"It was a very touchy situation for some period of time. There was dramatic change at Cleveland and a couple of incidents that caused people to react. It was touch and go for some time.

"But the kids and the parents and the staff just started to buckle down to some tough situations, and I feel we came through it well."

Wentz said, "When you reflect back on the entire school year, with all the adjustments, all the traumatic impact that has been made on the system, all in all it's been one of our best years ever.

"Ninety-five percent of what we were trying to do came to fruition. I'm really pleased with our people. They've done a super job."

Fourteen-year-old Tammi Hancock, who was bused to Soldan, said her parents "didn't want to see me getting hurt but they wanted me to do what I wanted to do."

"I had a choice of going to a private school," she said, "but I wanted to go to Soldan and give it a try.

"Some people didn't like it, but I didn't mind."

If most students interviewed by The Globe-Democrat saw the first year of desegregation as a success, parents appeared nearly as enthusiastic.

Virginia Ackerman, mother of Cleveland student Beth Ackerman, a white, said, "I thought there would be confusion and fighting and all the carrying on like the beginning of the year, but they seemed to have gotten it under control better than I gave them credit for.

"It wasn't any one person who did it all by himself—the parents, the teachers, everyone had to work together to make it work.

"I still don't think we should be wasting all that fuel for busing. But it did seem like things went pretty smooth."

Janice Mosby, principal of Banneker, said, "Many parents said they were surprised and pleased how many of the children responded to and accepted the school. But remember, all children respond to kindness and love."

High school classes ended Wednesday; other schools closed their doors Friday afternoon.

A school year that had been clouded in uncertainty a year earlier was done. Some of the old bitterness still remained. Some will never disappear.

"We didn't like it at first," said Jackie Grossius, mother of Soldan students George and Mary Ann Grossius. "But that's all we could do."

And in the end, she said, "it wasn't so bad after all."

DENVER SCHOOLS ARE BETTER THAN YOU THINK

(By: Art Branscambe, education writer, Denver Post)

Would you believe it if I told you that the achievement test scores of students in the Denver Public Schools have been rising for several years now?

That they are higher, now when the school system is only about 42 percent Anglo, than in 1971, when it was 60 percent Anglo?

Would you believe that, for youngsters headed for college, Denver schools this year gave more advanced placement courses and tests than all the suburban school systems put together?

Would you believe that, due to the unmatched number and range of its alternative programs for disadvantaged (or gifted) children, Denver's dropout rate is one of the lowest in the metropolitan area? Lower than Northglenn, Westmininster, Aurora, Englewood, among others? Only one percent higher than Jefferson County?

No, you wouldn't believe anything like that, would you?

How could you? Haven't you read time and again, in Time and Newsweek, haven't you seen time and again on television, that public schools of the nation are in terrible shape, that those in the absolute worst pits are urban, big-city schools?

Denver is a big city, is it not? 24th largest in the nation. Therefore, inevitably, its schools must be bad, right?

Believe it or not, wrong.

Achievement test scores in Denver are and have been rising since at least 1978. They are higher now than they were before desegregation. To be sure, the standardized tests used were changed in 1976, so it's impossible to say precisely how much better the achievements of Denver students are now than they were then.

But just so you'll get the flavor of the Denver school system's achievement, back in the dear, dead days of 1971, when the system was like 60 percent Anglo and 95 percent segregated, the citywide score in second grade on a standardized reading test was 42. In 1977, three years after desegregation, it was 49 and in 1980 it was 57. That's seven percentile points above the national norm.

Seven points above the national norm isn't good enough for you?

And somebody needs to stand up and say it's wrong. Back in the early days of the civil rights movement, blacks used to make a big point, in trying to educate Anglos like myself to the inner realities of racism, of the fact that whites too often stereotyped blacks—saying they all had rhythm, could sing beautifuly, cr whatever. Dumb, said blacks to us naive Anglos; blacks don't all sing well, have rhythm, or anything else. Blacks are as mixed a bag as any other group of people.

Well, nowadays there are stereotypes about cities too. And realtors who want to sell homes there, and school officials who want to keep their schools racially balanced, have to fight those stereotypes. The idea that urban school systems must inevitably be bad is a stereotype, true of some cities, not true of others. Denver is one where it is not true.

Denver is in fact one of the very best big city school systems in the nation. In various respects, though not in all, certainly, it is better than many of its suburban neighbors, as we shall see. And I say that, not just from the viewpoint of a reporter viewing them from the outside. I have had three girls go through that system, in schools ranging from 20 to nearly 80 percent minority. They have all had good educations, with ups and downs of course, better some years and in some schools than in others. But this I must say, the girl who has had the best education was the last.

She graduated last June from East High and benefited the most from the various improvements the school system has put in since it became desegregated. For it is a far better school system now than it was then it was segregated, don't let anyone tell you differently.

For instance, my Mary spent a semester in the Denver Public Schools' Executive Intern Program, working with the top public relations executive at Columbia Savings. They had her doing everything, setting up and supervising various promotional contests, riding in a hot-air balloon, writing and typing press releases, escorting visitors around the place. And they had her doing it fast; she was startled at how fast she had to turn out the work. It was absolutely great experience, and something neither of her older sisters had a chance to do.

The next semester, a couple of teachers at East High worked her to a frazzle in advanced placement courses—of which you'll hear more soon. It was tough, but she is surviving a high-pressure freshman year at Northwestern University now only because of what she learned in one of those classes, and because of the pressure they put on her last spring at East High.

So much for a father's eye view of the Denver Public Schools; now for a more reportorial view.

Some realtors maybe feel they have to advise people with school-age children to skip Denver and settle in some suburb like Aurora, perchance? Let me clue you in on a little secret. In the 1978–79 school year, Aurora tested grades 3, 5, 8 and 11; Denver tested grades 2, 5 and 11. They used different tested and therefore the results cannot be compared precisely. Nevertheless, the results can be used as a general indication of the relative academic standing of the two school districts. The citywide scores for Aurora were, for the grades it tested, 55, 53, 55 and 56, none, as high as Denver's lowest scores.

I cite these little facts, by the by, not to put down Aurora, but simply to point out that Denver just might be better than many people think.

Compare Denver, for another example, to Jefferson County, another big school system which, despite its size, manages to be very good. The three grades Jeffco tested in 1978–79 were the 3rd, 6th and 9th. The countywide scores for those grades were, respectively, 67, 70 and 68—just about 10 points higher than Denver in each grade. So Denver has got a ways to go before it can catch up with Jeffco, right?

Right on, mates. But if Denver, with its 44 percent Anglo enrollment, can match 95 percent Anglo Jeffco, under any circumstances, which school system would you say is doing the best job with what it has?

Well, here's another little secret for you. Again using the 1978–79 scores, the top five elementary schools in Jefferson County in third grade reading were Ralston, Secrest and Stevens schools, Ralston with a percentile score of 82, the other two with 81 and half a dozen schools tied at 77.

In Denver, using second grade reading scores from the same year's tests, and the same standardized test Jefferson County uses, the top five schools were Palmer at 92, Stevens at 88, Godsman at 84 and half a dozen schools tied at 76.

Now you tell me, if you are looking for the very best schools to send your child to, where are you going to find them? Stevens School in Denver, incidentally, is an old Victorian relic sitting in the heart of polyglot Capitol Hill, on the edge of the Congress Park neighborhood. Some of the kids are quite affluent; some are quite poor, and they come in every skin color God ever invented. But as the scores attest, that is quite a school. Live parents, live kids, live city neighborhood.

Let us turn now to one of the lesser known indicators of how much a school system really cares about getting the brightest of its students into college. Advanced Placement (AP) courses and tests. AP courses are college freshman-equivalent programs given to ambitious high school seniors (and sometimes juniors).

They are available in such fields as American or English Literature, Foreign Languages and Literature, American and European History, Calculus, Chemistry and Physics.

How a teacher teaches these courses is up to the teacher, but the pressure has to be more intense than the usual accelerated high school course because the payoff is the student's ability to pass the AP test at the end of the course. These tests are nationally standardized by the College Entrance Examination Board and devised by college professors.

But if a student passes with one of the top three grades, 3, 4 or 5, he or she can be granted college credit and allowed to skip that freshman course in college, a significant saving of time for the student and money for his parents. (The most competitive colleges only accept grades of 4 or 5 for credit; many, if not most public colleges will accept grades of 3 or better.)

So which school system in the metropolitan area has by far the most students in AP courses, has the highest percentage of students taking AP tests, gives the greatest number of tests and has the most students passing AP tests with grades of 3 or higher?

Yeah, sure, it's that slummy big-city system, Denver. It had 7.8 percent of its high school juniors and seniors taking AP tests in 1979–80.

That's 695 students, more by far than any other school district in the metro area. In 1980, Denver administered 1,137 tests, more than all the other 13 school districts in the Denver area put together. And Denver students passed 614 of those tests, 54 percent with a score of 3 or better.

The only Denver area school district coming even close to Denver's record on AP courses and tests is—guess—no, not Jefferson County, not Cherry Creek, but Littleton. Littleton in the 1979–80 school year had 207 youngsters, 6.5 percent of its high school seniors and juniors, taking some 341 Advanced Placement tests. And Littleton students passed 262 of the tests, or 76.8 percent, about what you expect of an affluent, white school district.

Jefferson County is down among the also-rans when it comes to Advanced Placement tests. They too are affluent and pretty white, at least compared to the 58 percent minority enrollment in Denver.

But just to show you how things go, there is one high school in Denver that is still pretty segregated, full of low income minority students. On almost any academic indicator, its ratings are the lowest of any high school in Denver. And on AP tests, it is typically low, only about 1.4 percent of its students tried the AP tests in the spring of 1980.

Pretty sorry, huh? Well, I don't want to put anybody down, but that 1.4 percent is the same percentage of students who took the AP tests in Jefferson County. What does that prove? Who knows?

Perhaps it would at least suggest that, in the Denver area, you can't tell the best school districts without a lengthy scorecard.

Now let us consider an indicator of how well a school system has fine-tuned its offerings to the needs of its students, dropout rates. Generally speaking, the presence of large numbers of minority and low income children is supposed to make it more difficult for a school district to hold down its dropout rate, to hold its youngsters in school. This is particularly true if the school district also has to cater to significant numbers of affluent, highly motivated children, which Denver does.

So where does Denver rank among metropolitan area school districts on this indicator? Right in the middle, about 8th out of 14, according to 1979–80 figures of the Colorado Department of Education.

That is, Jeffco, with its 93 percent Anglo enrollment, has an 8.9 percent annual dropout rate.

Denver, with its 42.9 percent Anglo enrollment, has a 9.9 percent dropout rate. Both were much higher than Cherry Creek's 2.4 percent, which is by far the best in the area. (Next best is Boulder's 6.7 percent.)

On the other hand, Denver's 9.9 percent is almost equally far below the 16.8 percent rate in Denver, a system with only 19 percent minorities, or Westminster's 13.7 percent. Westminster's pupil membership is 23 percent minority.

And there's one final indicator, to which teachers generally pay more attention than parents. A school district's pupil-teacher ratio. Even though pupil-teacher ratio has only a vague relationship to the actual class sizes a pupil will find in a school system, the ratios do say something about the comparative amounts of adult help a student can expect in various school districts.

On this scale, Denver is far and away tops, or lowest in the ratio of pupils to teachers at 17. Next lowest, are Westminster at 18.2 pupils per teacher, and Commerce City at 18.3. In the middle of the rankings are Aurora and Cherry Creek, both at 20.

Highest ratios belong to Jefferson County, at 20.8, Littleton at 21.3 and Northglenn-Thornton at 21.4.

In sum, when speaking of Denver in comparison with the other school districts of the metropolitan area, as they say in that beer commercial, it is surprising, and the surprise is how good it is.

Two final points about all this.

Point one is, if you didn't know how good the Denver Public Schools are, one reason, aside from the stereotypes, is that their public relations operation is lousy. They do a better job of hiding their light under a bushel than any school system. I know. If you want to know how good they are, you gotta guess, you don't catch them telling you.

Point two is, as Dr. Orfield says, they're running out of time. If they ever want to get Anglos with children to move into the city, desegregate housing and improve their racial balance, their tax base, and get them off those court ordered buses, they need to see that people, especially realtors, do know the kind of facts I've been passing along.

If housing desegregation is ever to take place in Denver, someone, possibly realtors, is going to have to needle the Denver School Board into ending the secrecy about their quality.

INTEGRATED EDUCATION

January-February, 1976

will separate be more equal?

gary orfield

Once it became apparent, in the early 1950s, that the Supreme Court would seriously consider ordering school desegregation, there was a great rush in a number of states to make segregated schools more equal, at least in terms of some obvious, tangible features. Southern leaders reasoned if they were to defend separate but equal schools some of the most scandalous inequalities must be ended. After the 1954 decision the strategy continued. Local leaders hoped that more equal facilities would discourage the filing of law suits and help prevent blacks from transferring under court-ordered freedom of choice transfer plans.

The result was an epidemic of handsome new red brick schools for black children and a closing of the enormous gap between salaries for white and black teachers. When faced with the imminent threat of integration, southerners showed willingness to take some steps towards equality. The southern lawyers came before the Supreme Court arguing that if only segregation remained untouched new bond issues and other actions would deal with some of the most severe inequalities. In South Carolina, for instance, the Governor and the legislature had authorized a new $75 million bond issue.[1] Even under the gun, however, the equalization moves were limited. The new buildings were often overcrowded from the beginning and offered a limited range of courses taught by poorly trained teachers.

promises, promises

As the courts have begun to order large-scale urban school desegregation, a similar issue has emerged. Hardly an anti-busing speech or editorial omits a section about the waste of money on busing and the possibility of using the money instead to make the schools more equal. "Rather than require the spending of scarce resources on ever-longer bus rides . . .," said President Nixon, "we should encourage the putting of those resources directly into education."[2] President Gerald Ford has expressed similar sentiments:

> In my hometown of Grand Rapids, Michigan, we have . . . a pupil teacher ratio of twenty-five students to one teacher. In my judgment it would be far wiser to spend the money that we might spend for busing, to reduce the pupil-teacher ratio. It should be eight to one or seven to one. . . .[3]

Perhaps, these comments suggest, minority group leaders could exchange the threat of busing for some hard cash or some additional programs in ghetto or *barrio* schools. During the past decade these possibilities have been explored in a number of ways, both in and out of the courts. The general record has been one of frustration. Yet the issue continues to arise in Congress as successive anti-busing measures are voted into law.

The most important attack on tangible inequality came in the courts. After California state courts struck down the state's discriminatory system of school finance, litigation was launched in a number of states and many observers believed that the Supreme Court would find the entire system of statewide financing unconstitutional. The Supreme Court's 1973 decision in the *Rodriguez* case, however, rejected this whole line of argument, concluding that the Constitution could not require equal educational spending since education itself was "not among the rights afforded explicit protection under our Federal Constitution."[4] Even in states where the drive went forward in the state legislatures or state courts it soon became evident that equalization would principally benefit low income rural districts, since cities usually spent more money than the state-wide average, though less than many suburbs. At any rate, as the Court pointed out in the *Rodriguez* decision, research had produced no substantial evidence that an increment of funds would make any difference in the success of central city students.

Federal education aid would be another logical source of additional money for ghetto schools. Title I of the Elementary and Secondary Education Act was intended to focus federal funds on concentrations of poor children and was originally expected to account for a steadily rising percentage of school expenditures. Unfortunately, federal assistance during the past seven years has accounted for a declining fraction of rapidly growing educational costs. While President Nixon was fighting desegregation, he was also vetoing three of the first four education appropriation bills of his administration.[5] In a dramatic election year speech calling for anti-busing legislation, President Nixon promised more money for ghetto schools. But when his message actually went to Congress, it turned out that the President was merely proposing to concentrate existing funds on fewer schools, providing no new money.[6]

The same pattern continued when President Ford sent up his first education budget. Senator Walter Mondale summarized the proposal in an address to the National Education Association:

> The budget . . . recommends an absolute cut of almost $600 million in federal aid to elementary and secondary education, which, if one accounts for inflation, is an effective cut of $959 million. The Ford budget virtually freezes funding for Title I, which is an effective cut of $200 million; rescinds the entire increase for bilingual and handicapped education; reduces emergency school aid

> [desegregation assistance] funding by $160 million, virtually eliminating it, and, in fact, eliminates all funds for drop-out prevention, nutrition, health, and ethnic heritage. It would cut $300 million from the school lunch program.[7]

Mondale concluded that Ford was attempting to cut the education budget twenty-five percent in dollars of constant value.

There are many local variations, of course, on the national discussion of the relationship between the question of integration and that of more equal schools. In some cases, there have been explicit trades. The most famous of these came in the bitterly controversial deal between the Atlanta chapter of the NAACP and the local school board to settle the NAACP desegregation case out of court. The local chapter dropped the case in exchange for an agreement to appoint black administrators to key positions within the school bureaucracy. The arrangement was subsequently denounced by the national NAACP and the leadership of the local chapter removed.[8] The deal, however, was implemented and it did reflect the frustrations of pursuing traditional strategies in a school system like Atlanta's which was rapidly becoming as overwhelmingly black as that of Washington, D.C.

community control

At another level, community organizers in New York and other large cities pressed in the late 1960s for a policy of "community control." Confronted with a long and bitter deadlock on desegregation, they proposed a substitute approach based on breaking up large school districts and turning over control of ghetto and *barrio* schools to local black and Latino leaders who would presumably be more responsive to the needs of minority children. The issue produced a terrible teachers strike in New York and eventual legislation which transferred a limited range of power to community school boards.

The community control compromise has been a bitter disappointment in New York City. The people in the communities weren't very interested. About a seventh voted in the first elections and the turnout fell to less than a tenth by 1975. The United Federation of Teachers, the principal enemy of many community activists, decisively dominated the elections. In 1975, UFT-endorsed candidates won control of twenty-seven of the thirty-two local boards.[9] Some of the local boards were being investigated for illegal patronage and corruption.[10] One of the principal uses of local power was to preserve segregation in white areas. A movement intended to provide a major alternative path to reforming urban schools became an instrument for reinforcing the union's power and for a return of the old ward level politics and corruption that had plagued big city schools early in the twentieth century. It only reinforced segregationist tendencies.

During the 1971-72 period, when broad metropolitan school desegregation seemed a real possibility, the issue of additional money for central cities arose again in some localities. One member of the Louisville school board reported that the state legislature granted the city additional funds as a *quid pro quo* for temporarily withdrawing the threat of a metropolitan law suit. Had the Supreme Court supported metropolitanism in the Detroit case, the issue might well have arisen in other areas.

money and the busing bills

Against this backdrop of attempts to forestall desegregation by transferring money or power to segregated systems, it is fascinating to examine Congressional treatment of the issue in its recent anti-busing debates. Each time, there has been some discussion of the possibility of providing additional funds to the schools that would remain segregated or be resegregated if the policy of limiting busing were enforced. Congress, however, has not provided money. The position of the president has been to fight for cutting back even the existing aid programs.

The 1974 busing fight centered on the battle to extend the Elementary and Secondary Education Act. As the House and Senate were writing into the bill various restrictions on desegregation, they were also debating allocation formulas and considering motions to provide additional funds for central city schools. The votes showed that Congress was not only moving toward entrenching racial separation but also toward intensifying educational inequalities.

When the House passed the 1974 bill, the anti-busing strictures were accompanied by a new allocation formula which gave more money to the suburbs and the South, while cutting back funds to big cities like New York and Washington.[11] Two Democrats from the Detroit suburbs, James O'Hara and William Ford, pressed for an amendment which would have taken an additional $4.4 million from Detroit and would have given $5.6 million more to two largely segregated suburban counties, both among the twenty richest in the nation.[12] O'Hara and Ford had also been leaders of the anti-busing forces since the metropolitan issue first arose in Detroit. Fortunately, the House rejected their amendment.

An effort to gain House support for a "compromise" bill restraining the courts but also permitting some desegregation and providing funds for ghetto school upgrading received no serious support. This approach, introduced by Rep. John Anderson (R-Il.), leader of the House Republican Conference, received so few votes that its sponsors did not even ask for a roll call.[13]

The House was ready to vote for virtually any limitation on urban desegregation that could be drafted, but there was no interest in upgrading the schools that would be condemned to continued segregation. The dominant impulse, in fact, was to shift the money where the votes were, away from the declining and increasingly powerless older central cities.

The bill then went to the Senate, which had traditionally defeated House anti-busing measures. In 1974, however, the Senate began to change, enacting the first substantial limitation on civil rights enforcement authority since 1954. The Senate passed a complex and confusing compromise, after narrowly defeating efforts to directly curtail the courts. The compromise, its advocates claimed, ended HEW's authority to require system-wide urban desegregation and subjected the courts to a number of new procedural limitations.[14]

While the Senate was debating the bill, there were two attempts to provide special compensatory programs for ghetto education. Though the proposals came from both sides of the aisle, under the sponsorship of moderate members, they didn't get off the ground.

Florida Democrat Lawton Chiles, Jr. supported "Prize School" legislation he hoped would turn segregated inner city schools into excellent schools. Senator Chiles was prepared to increase resources in such schools very substantially. Any school with more than forty percent poor children would receive *additional* funds equal to two-thirds or more of the average national per student expenditure. Although Chiles said he thought people would be ready to provide an estimated $2.5 billion annual cost to solve the busing conflict, the proposal engendered no enthusiasm. Chiles took the amendment off the floor without any vote on the understanding that it would be considered sometime later in committee.[15]

Connecticut Republican Lowell Weicker, Jr. had little more luck with his Quality School Aid bill. The measure would have more than doubled compensatory education money through a variant of the revenue sharing approach. To show his seriousness, Weicker incorporated in the measure a small (1.5 percent) income tax surcharge to pay for it. This, he told the Senate, would provide money to eliminate "inferior schools with inferior teachers and opportunities."[16] Once members found out that a small tax rise was included, he remembers, "I never lost so many cosponsors in my life." Though Weicker was puzzled at the opposition to "some sacrifice, some discomfort," the measure was voted down 4-83.[17]

The next year, in September 1975, there was some discussion of similar proposals, as the Senate proceeded to repeal major provisions of the 1964 Civil Rights Act. Once again, nothing came of them though they would have provided far less money than the proposals of the previous year. A parliamentary objection by southern leader James Allen (D-Ala.), prevented consideration of a $1 billion proposal sponsored by Senator Edward Kennedy (D-Mass.). When Minority Whip Robert Byrd (D-W. Va.), proposed to increase Title I funds $300 million by transferring money from health programs, the Senate's only black member, Edward Brooke (R-Mass.) angrily attacked it as an attempt to appease Byrd's conscience with a small one-year increment of funds. The parliamentary situation required unanimous consent for consideration of the Byrd amendment. Brooke objected.[18]

At one point in the debate Senator Chiles took the floor to talk about his Prize School idea again. He had even found a working model of his idea in a ghetto school in Sarasota, Florida which had been dramatically upgraded and now has a waiting list of whites wanting to transfer in. In three years of effort, he said, his idea had gone nowhere. "I cannot get any hearings on the bill," he told the Senate.[19]

The Senate's actions in 1975 went one more step toward destroying what remains of the federal civil rights enforcement program without making even a symbolic gesture toward offering equal education in segregated schools. When attacking desegregation, members of Congress and administration officials talk often about the need to upgrade programs instead. In fact, however, the clear pattern of policy which has emerged is moving toward both greater segregation and more unequal programs.

the problems with plessy

From the beginning a central problem with the separate but equal doctrine has been that once separation is assured, the dominant white society rarely feels any need to make even a pretense of equality. Achieving substantive equality, even in terms of offering the same range of challenging courses to better students, would be vastly more expensive in a ghetto setting because of the heavy burdens the schools must also carry in dealing with the high concentrations of educationally and personally disrupted children in very poor neighborhoods. Even if the extensive research suggesting that large increments of money make very little difference in such a setting were wrong, the country seems to be heading in exactly the opposite direction. At the same time a consensus forms for the assumption that big city desegregation is infeasible, no one seems upset about the fact that there are now forty students in a classroom in the schools of inner city New York. Even if one could ignore the Supreme Court's telling point that black schools will inevitably be seen and treated as unequal and inferior by the white majority, there is no disposition to increase the resources for ghetto education, even modestly.

The new version of the separate but equal doctrine, embraced by a growing number of national leaders and commentators, has the same failings as its pre-1954 cousin. The "equal" part is just rhetoric. The "separate" part reflects a cold determined reality. Unlike their predecessors in the South of the 1950s, opponents of urban integration haven't developed even a symbolic equalization drive.

1. *Briggs* v. *Elliott*, 98 F. Supp. 529; for text of oral argument before the Supreme Court see: Leon Friedman ed. *Argument* (New York: Chelsea House, 1969).
2. *Congressional Record*, August 17, 1972, p. 28909.
3. Statement made when Ford was serving as House Republican leader, *Congressional Record* November 4, 1971, p. 39304.
4. *San Antonio Independent School District* v. *Rodriguez*, 93 Sp.Ct. 1278 (1973).
5. Gary Orfield, *Congressional Power: Congress and Social Change*, (New York: Harcourt Brace Jovanovich, 1975), Chapters 7 and 8.
6. The President's Message and extensive discussion of the legislation can be found in Senate Committee on Labor and Public Welfare, Subcommittee on Education, Hearings, *Equal Educational Opportunities Act of 1972*, 92nd Cong., 2d Sess. (1972).
7. Walter Mondale, "Education, Congress, and the Budget," address to NEA Convention, June 1975.
8. Nathaniel R. Jones, "Brown—20 Years Later," *Crisis* (May 1974), p. 154.
9. *New York Times*, May 9, 1975; May 14, 1975.
10. Leonard Buder, "City to Take Over 3 School Regions in Fiscal Trouble," *New York Times*, October 29, 1974.
11. *Congressional Record*, March 21, 1974, pp. H1710-11.
12. *Congressional Record*, March 26, 1974, P. H2141.
13. *Ibid.*, p. H2177.
14. The legislation was interpreted in this fashion by the HEW Office for Civil Rights.
15. *Congressional Record*, May 16, 1974, p. S8447.
16. *Ibid.*, p. S8501.
17. *Congressional Quarterly*, October 18, 1975, p. 2232.
18. *Ibid.*
19. *Congressional Record*, September 19, 1975, p. S16377.

APPENDIX

Part 1—Proposed Legislation

97th CONGRESS
1st Session

S. 528

To establish reasonable limits on the power of courts of the United States in the imposition of injunctive relief in suits to protect the constitutional rights of individuals in public education and to authorize the Attorney General to institute suits to enforce such limits.

IN THE SENATE OF THE UNITED STATES

February 24 (legislative day, February 16), 1981

Mr. Johnston (for himself, Mr. Laxalt, Mr. Thurmond, Mr. Hollings, Mr. DeConcini, Mr. Exon, and Mr. McClure) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To establish reasonable limits on the power of courts of the United States in the imposition of injunctive relief in suits to protect the constitutional rights of individuals in public education and to authorize the Attorney General to institute suits to enforce such limits.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Neighborhood School Act of 1981".

STATEMENT OF FINDINGS AND PURPOSES

SEC. 2. (a) The Congress finds that—

(1) court orders requiring transportation of students to or attendance at public schools other than one closest to their residences for the purpose of achieving racial balance in public school systems have been an ineffective remedy and have not achieved unitary public school systems and that such orders frequently result in the exodus from public school systems of children which causes even higher racial imbalances and less support for public school systems;

(2) assignment and transportation of students to public schools other than to one closest to their residences is expensive and wasteful of scarce supplies of petroleum fuels;

(3) the pursuit of racial balance at any cost is without constitutional or social justification and that assignment of students to public schools or busing of students to achieve racial balance or to attempt to eliminate predominantly one race schools has been overused by courts of the United States and is in many instances educationally unsound and causes racial imbalances and separation of students by race to a greater degree that would have otherwise occurred;

(4) assignment of students to public schools closest to their residence (neighborhood public schools) is the preferred method of public school attendance and should be employed to the maximum extent consistent with the Constitution of the United States.

(b) The Congress is hereby exercising its power to enforce, by appropriate legislation, the provisions of the fourteenth amendment.

LIMITATION OF INJUNCTIVE RELIEF

SEC. 3. Section 1651 of title 28, United States Code, is amended by adding the following new subsection (c):

"(c)(1) No court of the United States may order or issue any writ ordering directly or indirectly any student to be assigned or to be transported to a public school other than that which is nearest to the student's residence unless—

"(i) such assignment or transportation is provided incident to attendance at a 'magnet', vocational, technical, or other school of specialized or individualized instruction;

"(ii) such assignment or transportation is provided incident to a purpose directly and primarily related to an educational purpose;

"(iii) such assignment or transportation is provided incident to the voluntary attendance of a student at a school; or "(iv) the requirement of such transportation is reasonable.

"(2) The assignment or transportation of students shall not be reasonable and a court of the United States shall not issue any writ ordering the assignment or transportation of any student if—

"(i) there are reasonable alternatives available which involve less time in travel, distance, danger, or inconvenience;

"(ii) such assignment or transportation requires a student to cross a school district having the same grade level as that of the student;

"(iii) such transportation plan or order or part thereof is likely to result in a greater degree of racial imbalance in the public school system than was in existence on the date of the order for such assignment or transportation plan or is likely to have a net harmful effect on the quality of education in the public school district;

"(iv) the total actual daily time consumed in travel by schoolbus for any student exceeds by 30 minutes the actual daily time consumed in travel by schoolbus to and from the public school with a grade level indentical to that of the student and which is closest to the student's residence;

"(v) the total actual round trip distance traveled by schoolbus for any student exceeds by 10 miles the total actual round trip distance traveled by schoolbus to and from the public school closest to the student's residence and with a grade level identical to that of the student.".

SUITS BY THE ATTORNEY GENERAL

SEC. 4. Section 407(a) of title IV of the Civil Rights Act of 1964 (Public Law 88–352, section 407(a); 78 Stat. 241, section 407(a); 42 U.S.C. 2000c–6(a)), is amended by inserting after the last sentence the following new subparagraph:

"Whenever the Attorney General receives a complaint in writing signed by an individual, or his parent, to the effect that he has been required directly or indirectly to attend or to be transported to a public school in violation of the Neighborhood School Act and the Attorney General believes that the complaint is meritorious and certifies that the signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief, the Attorney General is authorized to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder."

97TH CONGRESS
1ST SESSION

S. 1005

To amend the Civil Rights Act of 1964 to provide for freedom of choice in student assignments in public schools.

IN THE SENATE OF THE UNITED STATES

APRIL 27, 1981

Mr. HELMS introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend the Civil Rights Act of 1964 to provide for freedom of choice in student assignments in public schools.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Student Freedom of Choice Act".

SEC. 2. The Civil Rights Act of 1964 (42 U.S.C. 1971—1975a–1975d, 2000a–2000h–6) is amended by adding at the end thereof the following new title:

"TITLE XII—PUBLIC SCHOOL—FREEDOM OF CHOICE

"SEC. 1201. As used in this title—

"(a) 'State' means any State, district, Commonwealth, territory, or possession of the United States.

"(b) 'Public school' means any elementary or secondary educational institution, which is operated by a State, subdivision of a State, or governmental agency within a State, or any elementary or secondary educational institution which is operated, in whole or in part, from or through the use of governmental funds or property, or funds or property derived from a governmental source.

"(c) 'School board' means any agency which administers a system of one or more public schools and any other agency which is responsible for the assignment of students to or within such system.

"(d) 'Student' means any person required or permitted by State law to attend a public school for the purpose of receiving instruction.

"(e) 'Parent' means any parent, adoptive parent, guardian, or legal or actual custodian of a student.

"(f) 'Faculty' means the administrative and teaching force of a public school system or a public school.

"(g) 'Freedom of choice system' means a system for the assignment of students to public schools and within public schools maintained by a school board operating a system of public schools in which the public schools and the classes it operates are open to students of all races and in which the students are granted the freedom to attend public schools and classes chosen by their respective parents from among the public schools and classes available for the instruction of students of their ages and educational standings.

"SEC. 1202. No department, agency, officer, or employee of the United States empowered to extend Federal financial assistance to any program or activity at any public school by way of grant, loan, or otherwise shall withhold, or threaten to withhold, such financial assistance from any such program or activity on account of the racial composition of the student body at any public school or in any class at any public school in any case whatever where the school board operating such public school or class maintains, in respect to such public school and class, a freedom of choice system.

"SEC. 1203. No department, agency, officer, or employee of the United States empowered to extend Federal financial assistance to any program or activity at any public school by way of grant, loan, or otherwise shall withhold, or threaten to withhold, any such Federal financial assistance from any such program or activity at such public school to coerce or induce the school board operating such public school to transport students from such public school to any other public school for the purpose of altering in any way the racial composition of the student body at such public school or any other public school.

"SEC. 1204. No department, agency, officer, or employee of the United States empowered to extend Federal financial assistance to any program or activity of any public school in any public school system by way of grant, loan, or otherwise shall withhold or threaten to withhold any such Federal financial assistance from any such program or activity at such public school to coerce or induce any school board operating such public school system to close any public school, and transfer the students from it to another public school for the purpose of altering in any way the racial composition of the student body at any public school.

"SEC. 1205. No department, agency, officer, or employee of the United States empowered to extend Federal financial assistance to any program or activity at any public school in any public school system by way of grant, loan, or otherwise shall withhold or threaten to withhold any such Federal financial assistance from any such program or activity at such public school to coerce or induce the school board operating such public school system to transfer any member of any public school faculty from the public school in which the member of the faculty contracts to serve to some other public school for the purpose of altering the racial composition of the faculty at any public school.

"SEC. 1206. Whenever any department, agency, officer, or employee of the United States violates or threatens to violate section 1202, section 1203, section 1204, or section 1205 of this Act, the school board aggrieved by the violation or threatened violation, or the parent of any student affected or to be affected by the violation or threatened violation, or any student affected or to be affected by the violation or threatened violation, or any member of any faculty affected or to be affected by the violation or threatened violation may bring a civil action against the United States in a district court of the United States complaining of the violation or threatened violation. The district courts of the United States shall have jurisdiction to try and determine a civil action brought under this section irrespective of the amount in controversy and enter such judgment or issue such order as may be necessary or appropriate to redress the violation or prevent the threatened violation. Any civil action against the United States under this section may be brought in the judicial district in which the school board aggrieved by the violation or threatened violation has its principal office, or in the judicial district in which any school affected or to be affected by the violation or threatened violation is located, or in the judicial district in which a parent of a student affected or to be affected by the violation or threatened violation resides, or in the judicial district in which a student affected or to be affected by the violation or threatened violation resides, or in the judicial district in which a member of a faculty affected or to be affected by the violation or threatened violation resides, or in the judicial district encompassing the District of Columbia. The United States hereby expressly consents to be sued in any civil action authorized by this section, and expressly agrees that any judgment entered or order issued in any such civil action shall be binding on the United States and its offending department, agency, officer, or employee, subject to the right of the United States to secure an appellate review of the judgment or order by appeal or certiorari as is provided by law with respect to judgments or orders entered against the United States in other civil actions in which the United States is a defendant.

"SEC. 1207. No court of the United States shall have jurisdiction to make any decision, enter any judgment, or issue any order requiring any school board to make any change in the racial composition of the student body at any public school or in any class at any public school to which students are assigned in conformity with a freedom of choice system, or requiring any school board to transport any students from one public school to another public school or from one place to another place or from one school district to another school district in order to effect a change in the racial composition of the student body at any school or place or in any school district, or denying to any student the right or privilege of attending any public school or class at any public school chosen by the parent of such student in conformity with a freedom of choice system, or requiring any school board to close any school and transfer the students from the closed school to any other school for the purpose of altering the racial composition of the student body at any public school, or precluding any school board from carrying into effect any provision of any contract between it and any member of the faculty of any public school it operates specifying the public school where the member of the faculty is to perform his or her duties under the contract.".

97TH CONGRESS
1ST SESSION

S. 1147

To secure the right of students entitled to equal protection of the laws to be free from purposeful discrimination and segregation and to be treated in a racially neutral manner with regard to their assignment to public schools providing free public education, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 8 (legislative day, APRIL 27), 1981

Mr. GORTON introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To secure the right of students entitled to equal protection of the laws to be free from purposeful discrimination and segregation and to be treated in a racially neutral manner with regard to their assignment to public schools providing free public education, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Racially Neutral School Assignment Act".

FINDINGS

SEC. 2. (a) In order to secure the right of students to be free from purposeful segregation and discrimination in their assignments to public schools, the Congress, pursuant to the authority granted under section 5 of the fourteenth amendment of the Constitution, enacts the provisions of this Act.

(b) The Congress finds and declares that the assignment of students to public schools on the basis of their race or color—

(1) is not reasonably related nor necessary to the achievement of the compelling governmental interest in eliminating de jure, purposeful segregation because such segregation can be eliminated without student assignments based on race or color;

(2) causes significant educational, familial, and social dislocations without commensurate benefits;

(3) undermines community support for public education;

(4) is disruptive of social peace and racial harmony;

(5) has not produced an improved quality of public education;

(6) debilitates and disrupts the public educational system and wastes public resources;

(7) constitutes a serious interference with the private decisions of parents as to how their children will be educated;

(8) unreasonably burdens individuals who are not responsible for the wrongs which such assignments seek to remedy; and

(9) denies the right of racially neutral treatment in school assignments to which students are, or ought to be, entitled.

(c) In light of the other findings contained in this section, Congress concludes that racially conscious assignment of students to schools is not necessary to the enforcement of the right to be free from purposeful segregation and discrimination in school assignments. Congress accordingly determines that every student has the right to have his or her assignment to public school determined in a racially neutral manner.

DEFINITIONS

SEC. 3. As used in this Act—

(1) The term "public school" means a day or residential school which provides elementary or secondary education, as determined under State law, except that it does not include any education beyond grade twelve.

(2) The term "free public education" means education which is provided at public expense, under

public supervision and direction, and without tuition charge, and which is provided as elementary or secondary school education in the applicable State, except that such term does not include any education beyond grade 12.

(3) The term "student" means any individual who has not attained eighteen years of age.

(4) The term "State" shall include each of the several States, the District of Columbia, any Commonwealth or Territory of the United States, and any agency, board, commission, county, city, township, parish, municipal corporation, school district, or other political subdivision thereof.

RIGHTS PROTECTED

SEC. 4. (a) No student shall be denied the right to be free from purposeful segregation and discrimination by school authorities in his or her assignment to a public school. In view of the finding in section 2(b) that racially conscious school assignments are not necessary or appropriate to the enforcement of that right, no student shall be denied the right to have his or her assignment to a public school determined in a racially neutral manner.

(b) No court, department, or agency of the United States or of any State shall order the implementation of any plan which would require, because of the race or color of any student, the assignment of that student to a public school which provides free public education other than the school closest to his or her place of residence which provides the appropriate grade level and type of education for the student.

JURISDICTION AND RELIEF

SEC. 5. (a) Any person aggrieved by a violation of this Act may bring a civil action in the appropriate district court of the United States for such equitable relief as may be appropriate.

(b) The Attorney General may bring an action for a declaratory judgment in any appropriate case in which the Attorney General determines that the rights of individuals aggrieved by a violation of this Act will be served by bringing such an action.

(c) The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

TECHNICAL AMENDMENTS

SEC. 6. (a) Section 203(b) of the Equal Educational Opportunities Act of 1974 is amended to read as follows:

"(b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of de jure, purposeful segregation.".

(b) Section 215(a) of such Act is amended by striking out "or next closest".

SAVINGS PROVISION

SEC. 7. The provisions of this Act shall supersede all other provisions of Federal law that are inconsistent with the provisions of this Act.

APPLICATION

SEC. 8. This Act shall apply with respect to any order of a court, department, or agency of the United States or of any State, whether issued before or after the enactment of this Act.

97TH CONGRESS
1ST SESSION

S. 1760

To provide for civil rights in public schools.

IN THE SENATE OF THE UNITED STATES

OCTOBER 21 (legislative day, OCTOBER 14), 1981

Mr. HATCH introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To provide for civil rights in public schools.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Public School Civil Rights Act of 1981".

SEC. 2. The Congress finds that—

(1) the assignment of students to public schools on the basis of race, color, or national origin, or in order to achieve balance or correct imbalance regarding race, color, or national origin in public schools—

(A) violates constitutional and legal guarantees that individuals shall not be denied equal protection of the law;

(B) violates constitutional and legal guarantees that individual rights shall not be abridged on the basis of race, color, or national origin;

(C) has failed to demonstrate educational benefits commensurate with the disruption caused by such assignment;

(D) has failed to demonstrate social benefits commensurate with the disruption caused by such assignment;

(E) has contributed to a significant deterioration of public schools in the districts subject to such orders regarding assignment by inducing large numbers of families to migrate away from such districts;

(F) has contributed to the deterioration of public education by removing the neighborhood school as the focus of such education;

(G) has disrupted the education of countless schoolchildren who must endure lengthy transportation to and from school each day, and, as a result, must often forego participation in extracurricular activities occurring after school;

(H) has eroded community commitment to public schools and public education;

(I) interferes with the right of parents to make decisions regarding the education of their children;

(J) disrupts racial harmony by characterizing and classifying students on the basis of race or color and assigning them to schools on such basis;

(K) diverts significant amounts of financial resources away from direct improvement of the quality of education;

(L) usurps the responsibilities and traditional functions of State and local authorities to provide an educational system meeting the distinct needs of the community; and

(M) undermines public respect for the Government and its system of administering law and justice;

(2) past unconstitutional segregation, such as racial segregation enforced by law, is not a significant cause of existing racial imbalances in public schools,

(3) since assignment of students to public schools on the basis of race cannot be justified as a means of preventing or undoing racial discrimination by school authorities, such assignment is itself an unjustifiable

practice of racial discrimination by the Government in violation of the fourteenth amendment; and

(4) whatever the basic cause of racial imbalance in the public schools, assignment of students to public schools on the basis of race, color, or national origin results in more segregation of the races by inducing large numbers of nonminority families to migrate away from school systems subject to such assignment or by inducing large numbers of nonminority families to seek alternatives to public school education.

SEC. 3. (a) The Congress finds the remedies listed in subsection (b) are available for unconstitutional segregation exclusive of court orders which assign students to public schools on the basis of race, color, or national origin, finding that such orders themselves have the effect of excluding students from public schools on the basis of race, color, or national origin.

(b) The remedies which the Congress finds are available are—

(1) legal injunctions suspending all implementation of a segregative law or other racially discriminatory Government action;

(2) contempt of court proceedings where such injunctions are not scrupulously obeyed;

(3) programs without coercion or numerical quotas or specific goals based on racial balance that permit students to voluntarily transfer to other schools within the school district where they reside;

(4) advance planning in construction of new facilities to provide nondiscriminatory education within the students' neighborhood; and

(5) other local initiatives and plans to improve education for all students without regard to race, color, or national origin.

SEC. 4. The Congress, pursuant to its authority and powers granted under article III of the Constitution, and under section 5 of the fourteenth amendment to the Constitution, enacts the provisions of this Act in order to protect public school students against discrimination on the basis of race, color, or national origin.

SEC. 5. Section 1343 of title 28, United States Code, is amended by designating the current language as section (a) and adding at the end thereof the following:

"(b)(1) Notwithstanding any other provision of law, no inferior court established by Congress shall have jurisdiction to issue any order requiring the assignment or transportation of students to public elementary or secondary schools on the basis of race, color, or national origin or to issue any order which excludes any student from any public school on the basis of race, color, or national origin.

"(2) In the case of court orders entered prior to the date of this Act that require, directly or indirectly, the assignment or transportation of students to a public elementary or secondary school on the basis of race, color, or national origin or which excludes any student from any school on the basis of race, color, or national origin, any individual or school board or other school authority subject to such an order shall be entitled to seek relief from such order in any court and unless that court can make conclusive findings based on clear and convincing evidence that—

"(1) the acts that gave rise to the existing court order intentionally and specifically caused, and in the absence of the order would continue intentionally and specifically to cause, students to be assigned to or excluded from public schools on the basis of race, color, or national origin; for purposes of this finding, these 'acts that gave rise to the existing court order and intentionally and specifically caused, and in the absence of the order would continue intentionally and specifically to cause, students to be assigned to or excluded from public schools on the basis of race, color, or national origin' (including but not limited to school district reorganization, school boundary line changes, school construction, and school closings) shall not include legitimate efforts to employ public education resources to meet public education needs without regard to race, creed, or national origin,

"(2) the totality of circumstances have not changed since issuance of the order to warrant reconsideration of the order,

"(3) no other remedy, including those mentioned herein, would preclude the intentional and specific segregation,

"(4) the economic, social, and educational benefits of the order have outweighed the economic, social, and educational costs of the order,

then such plaintiffs shall be entitled to relief which is consistent with the provisions of this subsection and the Public School Civil Rights Act of 1981 from such order.".

PART 2.—ADDITIONAL CORRESPONDENCE AND ARTICLES

SAM J. ERVIN, JR.,
Morganton, N.C., March 17, 1981.

Hon. ORRIN G. HATCH,
United States Senate, Washington, D.C.

DEAR SENATOR HATCH: It seems to me that the time has come for Congress to put an end to one of the most aggravated forms of tyranny now being practiced upon the people of the United States by the federal courts and the federal bureaucrats—the forced busing of school children for integration purposes.

While I was serving in the Senate, I prepared a bill with great care which was designed to end such busing in any school district which adopted a freedom of choice plan as described in my bill. This bill is referred to in the enclosed article and is also set forth on pages 19-25 of the hearings held by the Senate Subcommittee on Constitutional Rights on February 19-21, 1974.

The article enclosed is a lengthy but complete one which demonstrates that under proper decisions of the Supreme Court and the exact wording of the Equal Protection Clause, the busing for integration purposes is unconstitutional as well as foolish, wasteful, and tyrannical.

I notice that efforts are afoot to renew the Voting Rights Act of 1965, which is perhaps the most devious piece of legislation ever enacted by the Congress. I discuss this act in the enclosed article. The act holds in effect that states condemned by it and their state officials and their people in their corporate capacities are denied the benefit of the prohibition on bills of attainder, notwithstanding that the Supreme Court has adjudged that federal officials and even members of the communist party are entitled to this protection. Under this act, a number of states cannot even exercise powers reserved and granted to them by the Constitution of the United States and change their election laws in any respect without going to Washington hat in hand and securing the prior permission of the Attorney General of the United States or the District Court of the District of Columbia.

With all good wishes, I am

Sincerely yours,

SAM J. ERVIN, Jr., *Former U.S. Senator.*

Enclosure.

STATEMENT OF SAM J. ERVIN, JR. OF MORGANTON, N.C., A FORMER U.S. SENATOR FROM NORTH CAROLINA

EXCLUSION FROM NEIGHBORHOOD SCHOOLS OF CHILDREN AND THEIR FORCED BUSING FOR INTEGRATION: UNCONSTITUTIONAL FEDERAL TYRANNIES

The exclusion from their neighborhood schools and the forced busing of school children for integration purposes is a foolish, wasteful, and useless tyranny, which is outlawed by the very provision of the Constitution invoked by the Supreme Court to justify it, namely, the equal protection clause of the Fourteenth Amendment.[1]

MY ABIDING CONVICTIONS RESPECTING THE CONSTITUTION

Before explaining why this is so, I deem it not amiss to make certain observations. I have lived about four score and five years; I have spent a substantial part of my energy and time during these years in studying the Constitution, its history, and its objectives; I have acquired by my study abiding convictions respecting these matters; and I note that many Americans far wiser than I have entertained like convictions.

The Constitution is our most precious heritage as Americans. When it is interpreted and applied aright, the Constitution protects all human beings within our borders from anarchy on the one hand and tryanny on the other.

The wise British statesman, William Ewart Gladstone, rightly described the American Constitution as the most wonderful work ever struck off at a given time by the brain and purpose of man.[2]

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[1] The Constitution, Fourteenth Amendment, Section 1.

[2] William Ewart Gladstone: Kin Beyond the Sea, North American Review, September-October, 1878.

WHY THE CONSTITUTION WAS WRITTEN AND ADOPTED

For ease of expression, I use the term Founding Fathers to designate those who framed and ratified the Constitution submitted by the Convention of 1787, and those who framed and ratified the amendments which have been added to it.

The Founding Fathers knew the history of the frustrating struggle of the people against arbitrary governmental power during countless generations for the right to self rule and to be free from tyranny, and understood the tragic lessons taught by that history.

As a consequence they comprehended these eternal truths: First, that "whatever government is not a government of laws is a despotism, let it be called what it may";[3] second, that the "occupants of public office love power and are prone to abuse it";[4] and, third, that what autocratic rulers of the people had done in the past was likely to be attempted by their new rulers in the future unless they were restrained by laws which they alone could neither alter nor nullify.[5]

The Founding Fathers desired above all things to secure to the people in a written Constitution every right they had wrested from autocratic rulers while they were struggling for the right to self rule and freedom from tyranny.

Their knowledge of history gave them the wisdom to know that this objective could be accomplished only in a government of laws, i.e., a government which rules by certain, constant, and uniform laws rather than by the arbitrary, uncertain, and inconstant wills of impatient men who happen to occupy for a fleeting moment of time legislative, executive, or judicial offices.

For these reasons, the Founding Fathers framed and ratified the Constitution, which they intended to last for the ages, to constitute a law for both rulers and people in peace and in war, and to cover with the shield of its protection all classes of men with impartiality at all times and under all circumstances.[6]

While they intended it to endure for the ages as the nation's basic instrument of government, the Founding Fathers realized that useful alterations would be suggested by experience.[7]

Consequently, they made provision for its amendment in one way and one way only, i.e., by combined action of Congress and the states as set forth in Article V. By so doing, they ordained that "nothing new can be put into the Constitution except through the amendatory process" and "nothing old can be taken out without the same process;"[8] and thereby forbade Supreme Court Justices to attempt to revise the Constitution while professing to interpret it.[9]

THE CONSTITUTIONAL SEPARATION OF POWERS

In framing and ratifying the Constitution, the Founding Fathers recognized and applied an everlasting truth embodied by the British philosopher, Thomas Hobbes in this phrase: "Freedom is political power divided into small fragments."

They divided governmental powers between the federal government and the states by delegating to the former the governmental powers necessary to enable it to operate as a national government for all the states, and by reserving to the states all other governmental powers.[10]

They divided among the Congress, the President, and the federal judiciary the powers given to the federal government by giving to Congress the power to make federal laws, imposing on the President the duty to enforce federal laws, and assigning to the federal judiciary the power to interpret federal laws for all purposes and state laws for the limited purpose of determining their constitutional validity.[11]

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[3] The Writings and Speeches of Danial Webster, National Edition, vol. 2, p. 165.

[4] George Washington: Farewell Address.

[5] Ex Parte Milligan, (1866) 4 Wall. (U.S.) 2, 120-121.

[6] Ibid.

[7] James Madison: The Federalist No. 43.

[8] Frankfurter, J.: *Ullman* v. *United States*, (1956) 350 U.S. 422, 428.

[9] Cardozo, C. J.: *Sun Printing and Publishing Association* v. *Remington Paper and Power Company*, 235 U.S. 338, 139 N.E. 470. See, also, *West Coast Hotel Co.* v. *Parrish* (1937) 300 U.S. 379, where Justice Sutherland stated in a dissent: "The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase 'Supreme law of the land' stands for and to convert what was intended as inescapable and enduring mandates into mere moral reflections. If the Constitution, intelligently and reasonably construed in the light of these principles, stands in the way of desirable legislation, the blame must rest upon that instrument, and not upon the court for enforcing it according to its terms. The remedy in that situation—the only true remedy—is to amend the Constitution."

[10] The Constitution, in its entirety, and Amendment X.

[11] The Constitution, Articles I, II, and III.

In making this division of powers, the Founding Fathers vested in the Supreme Court as the head of the Federal judiciary the awesome authority to determine with finality whether governmental action, federal or state, harmonizes with the Constitution as the supreme law of the land, and mandated that all federal and state officers, including Supreme Court Justices, should be bound by oath or affirmation to support the Constitution.[12]

THE DUTY OF SUPREME COURT JUSTICES

No question is more crucial to America than this: What obligation does the Constitution impose on Supreme Court Justices?

America's greatest jurist of all time, Chief Justice John Marshall answered this question with candor, clarity, and finality by his opinion in *Marbury* v. *Madison* and *Gibbons* v. *Ogden*. In these indisputably sound decisions, Chief Justice Marshall declared:

1. That the principles of the Constitution are fundamental, and are designed to be permanent.
2. That the words of the Constitution must be understood to mean what they say.
3. That the Constitution constitutes an absolute rule for the government of Supreme Court Justices in their official action.
4. That the oath or affirmation of a Supreme Court Justice to support the Constitution "is worse than solemn mockery" if he does not "discharge his duties agreeably to the Constitution of the United States." [13]

In elaborating his second declaration, Chief Justice Marshall said:

"As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightended patriots who framed our Constitution, and the people who adopted it, must be understood to have used words in the natural sense, and have intended what they have said."[14]

This being true, Supreme Court Justices are forbidden to commit verbicide on the words of the Constitution while they are pretending to interpret them. I am indebted to Dr. Oliver Wendell Holmes for the expressive term verbicide. He declared in his Autocrat of the Breakfast Table:

"Life and language are alike sacred. Homicide and verbicide—that is, violent treatment of a word with fatal results to its legitimate meaning, which is its life—are alike forbidden."[15]

The Founding Fathers undertook to immunize Supreme Court Justices against temptation to violate their oaths or affirmations to support the Constitution by making them independent of everything except the Constitution itself. To this end, they stipulated in Article III that Supreme Court Justices "shall hold their offices during good behaviour * * * and receive for their services a compensation, which shall not be diminished during their continuance in office."

In commenting upon the awesome power vested by the Constitution in Supreme Court Justices, Justice (afterwards Chief Justice) Stone made this cogent comment: "While unconstitutional exercise of power by the executive and legislative branches of government is subject to judicial restraint, the only check on our own exercise of power is our own sense of self-restraint."[16]

Many years after the adoption of the Constitution, Daniel Webster, one of the wisest of statesmen, made a caustic and correct comment upon public officials who undertake to substitute their personal notions for rules of law. He said:

"Good intentions will always be pleaded for every assumption of authority. It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters."[17]

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[12] The Constitution, Articles III and VI.

[13] *Marbury* v. *Madison*, (1803) 1 Cr. (5 U.S.) 137, 176-180.

[14] *Gibbons* v. *Ogden*, (1924) 9 Wheat (22 U.S.) 1, 188.

[15] Dr. Oliver Wendell Holmes: Autocrat of the Breakfast Table, (The Limited Editions Club 1955) Chapter I, page 9.

[16] *United States* v. *Butler*, (1936) 297 U.S. 1, 78.

[17] I cannot provide a citation for Daniel Webster's comment. I found it many years ago among his papers. I copied it, but did not note at the time where I discovered it. After seeking in vain to discover the occasion of its making, I requested the Library of Congress to research the question. The Library advised me that it was unable to solve the problem because Webster's papers are so inadequately indexed.

By this comment, Webster portrayed the judicial activist with accuracy. A judicial activist is a judge who interprets the Constitution to mean what it would have said if he instead of the Founding Fathers had written it.

The Constitution does not suffice, however, to check the unconstitutional exercise of power by Supreme Court Justices who are judicial activists because they are either unable or unwilling to subject themselves to the requisite self-restraint. As a consequence, they substitute their personal notions for constitutional precepts while pretending to interpret that instrument.

JUDICIAL ACTIVISM IS DESTRUCTIVE OF CONSTITUTIONAL GOVERNMENT

Many distinguished Americans, who understood and revered the Constitution, have rightly declared that judicial activism is destructive of the Constitution because it tends to substitute government by the personal notions of judges for the government of laws that instrument was ordained to establish. I quote three of the most famous of them.

George Washington, who served as President of the Convention which framed the Constitution before becoming the first President of our country under it, made this assertion in his Farewell Address:

"If in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always overbalance in permanent evil any partial or transient benefit which the use can at any time yield."

Judge Thomas M. Cooley, author of Constitutional Limitations, declared:

"1. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.

"2. A court * * * which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. * * * What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require."[18]

Benjamin N. Cardozo, Chief Judge of the New York Court of Appeals and Justice of the United States Supreme Court, stated in his enlightening treatise, The Nature of the Judicial Process that "judges are not commissioned to make and unmake rules at pleasure in accordance with changing views of expediency or wisdom" and that "it would put an end to the reign of law" if judges adopted the practice of substituting their personal notions of justice for rules established by a government of laws.[19]

NO JUDICIAL DECISION MERITS RESPECT IF IT IS REPUGNANT TO THE CONSTITUTION

Some of those who condone judicial activism and *verbicide* assert that all decisions of the Supreme Court ought to be deemed sacrosanct, and that patriotism commands all citizens to refrain from criticizing them because criticism diminishes the respect of the people for the Court.

This assertion is intellectual rubbish. No judicial decision merits respect unless it is respectable, and no judicial decision is respectable if it flouts the Constitution which the judges participating in it are bound by oath or affirmation to support.

As Justice Frankfurter has so well declared, "judges as persons or courts as institutions are entitled to no greater immunity from criticism than other persons or institutions * * * Judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt."[20]

Chief Justice Stone concurred with Justice Frankfurter's views by stating that "where the courts deal, as ours do, with great public questions, the only protection agaist unwise decisions, and even judicial usurpation, is careful scrutiny of their action, and fearless comment upon it."[21]

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[18] Judge Thomas M. Cooley: Constitutional Limitations, 8th ed., page 124.

[19] Benjamin N. Cordozo: The Nature of the Judicial Process, pp. 68, 136.

[20] Justice Frankfurter: *Bridges* v. *California*, (1941) 314 U.S. 252, 289.

[21] Alpheus Thomas Mason: Harlan Fiske Stone, Pillar of the Law, (1968 edition) p. 398.

The most vigorous denunciation of judicial activism and verbicide by Supreme Court Justices is to be found in opinions of their Brethren. For example, Justice Jackson had this to say in his concurring opinion in *Brown* v. *Allen*, 344 U.S. 443, 535:

"Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of the Justices. Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles."

Justice Jackson added this scathing observation to his concurring opinion: "But I know of no way that we can have equal justice under law except we have some law." (344 U.S. at page 546)

Since Justice Jackson wrote his concurring opinion in 1952, the Supreme Court has vastly stepped up its judicial activism and verbicide. By so doing, it has made plain a truth which James Madison expressed as a belief to the Virginia Convention on June 16, 1788. At that time Madison said:

"Since the general civilization of mankind, I believe that there are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations."

By constantly increasing judicial activism and verbicide, Supreme Court Justices have expanded for practical purposes the powers of the federal government in general and their own powers in particular far beyond the bounds to such powers set by the Constitution, and have converted the Supreme Court itself in large measure from a judicial tribunal in a government of laws into a judicial oligarchy whose decisions are controlled by the personal notions of its members.

As a consequence, the states have been largely reduced to meaningless zeros on the nation's map and virtually all the public activities of the people and many of their private activities, private preferences, and private thoughts have been directly or indirectly subjected to federal regulation.

Time and space preclude a statement of the impact of all their judicial activism and verbicide on constitutional government in America and the freedom of Americans. I shall, therefore, confine what I have to say on the subject to the decrees of the Supreme Court which sanction the exclusion from neighborhood schools and forced busing of school children for integration purposes. The Supreme Court asserts that these decrees are justified by the equal protection clause of the Fourteenth Amendment. The words and objective of this clause contradict this claim.

By practicing judicial activism and verbicide on this constitutional provision, the Supreme Court distorts it into conferring upon itself, inferior federal courts, and unelected federal bureaucrats the arbitrary power to deny school children of all races the right to attend schools in their neighborhoods and to order them to be bused to distant schools elsewhere to mix them in racial proportions pleasing to judges and bureaucrats, and thus makes innocent school children of all races the helpless and hapless pawns of judicial and bureaucratic tyranny.

The stark nature of this tyranny was revealed to a limited degree by news items of recent days emanating in Louisiana. According to these news items, a federal judge sitting in that state threatened to adjudge three white teenaged high school girls guilty of contempt of his court and to punish them accordingly.

Their offense was that they had continued to seek their education at their familiar neighborhood school instead of journeying by bus to an unfamiliar distant school elsewhere. In so doing they had allegedly disobeyed an order issued by the federal district judge commanding the state school board to deny them admittance to their neighborhood school and to bus them to the distant school elsewhere for integration purposes.

In a very real sense, all judges of inferior federal courts are servants of the federal judicial hierarchy headed by the Supreme Court. The federal district judge sitting in Louisiana undoubtedly acted under the conviction that his action was required by the forced busing decrees of Supreme Court Justices.

THE TRUE MEANING AND OBJECTIVE OF THE EQUAL PROTECTION CLAUSE

The Fourteenth Amendment became a part of the Constitution on July 21, 1868. When it is interpreted and applied aright, its equal protection clause is one of the simplest and most salutory of the provisions of the Constitution.

The clause extends its protection to all persons of all races, colors, or classes who are similarly situated within the boundaries of any state. Its objective is to secure equality to such persons under the laws of the state.[22] The clause specifies that no state "shall deny to any person within its jurisdiction the equal protection of the laws." [23]

By this phrase, the equal protection clause requires the laws of the state to treat all persons within its jurisdiction alike under like circumstances, both in the rights conferred and the responsibilities imposed.[24]

The clause applies only to states and to state officials acting under state laws. Further than that, the clause does not go. It does not apply in any way to private individuals, or confer upon the federal government any power to control their conduct.[25]

Since all federal officers, including Supreme Court Justices, are bound by oath or affirmation to support the Constitution, no court, department, or agency of the federal government has any power to require a state or any state officer acting in its behalf to violate the equal protection clause. The Supreme Court has expressly ruled that Congress cannot do so.[26]

THE BROWN CASE

During the 86 years following the ratification of the Fourteenth Amendment, presidents, governors of states, Congress, state legislatures, and federal and state courts interpreted the equal protection clause to permit a state to segregate by law persons within its jurisdiction on the basis of race as long as the facilities which served them were equal.

The interpretation was known as "the separate but equal doctrine." This doctrine did not originate in any Southern state. It had its genesis in Massachusetts. In 1849, the Supreme Judicial Court of Massachusetts created and applied in its *Roberts* v. *City of Boston,* 59 Mass. (5 Cush.) 198, when it rejected the plea of Senator Charles Sumner that the City of Boston be compelled to admit black children to a racially segregated school for whites.

By a 7 to 1 vote, the Supreme Court applied "the separate but equal doctrine" to the segregation of passengers on the basis of race in transportation in 1896 in *Plessy* v. *Ferguson,* 163 U.S. 537; and by an unanimous vote, the Supreme Court applied "the separate but equal doctrine" to the segregation of children in public schools on the basis of race in 1927 in *Gong Lum* v. *Rice,* 275 U.S. 78.

Justice Brown of Michigan wrote the opinion in *Plessy* v. *Ferguson* for a court composed of himself and Chief Justice Fuller of Illinois, and Justices Field of California, Harland of Kentucky, Gray of Massachusetts, Brewer of Kansas, Shiras of Pennsylvania, White of Louisiana, and Peckham of New York. Harlan dissented, and Brewer did not participate. Harlan based his dissent on the proposition that "our Constitution is color blind."

Chief Justice Taft wrote the opinion in *Gong Lum* v. *Rice* for an unanimous Supreme Court composed of himself and Justices Holmes and Brandeis of Massachusetts, Van Devanter of Wyoming, McReynolds and Sanford of Tennessee, Sutherland of Utah, Butler of Minnesota, and Stone of New York.

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[22] What I say is the true meaning and real objective of the equal protection clause has been established by indisputable sound decisions of the Supreme Court, the inferior federal courts, and state courts. These decisions are virtually past numbering. I cite only a few of the sound Supreme Court cases: *Hernandez* v. *Texas,* (1954) 347 U.S. 475; *Truax* v. *Corrigan,* (1921) 257 U.S. 312; *Buchanan* v. *Warley,* (1917) 245 U.S. 60; *Kentucky* v. *Powers,* (1906) 163 U.S. 228; *Yick Wo* v. *Hopkins,* (1896) 118 U.S. 356; and *Civil Rights cases,* (1883) 109 U.S. 3. See, also, *Banks* v. *Housing Authority of San Francisco,* 120 Cal. App. 2d 1, 260 P.2d 668, cert. den. 347 U.S. 974.

[23] Constitution, Fourteenth Amendment, Section 1.

[24] It is rightly stated in footnote 57 on page 775 of 16A American Jurisprudence, 2d Series, that "the decisions supporting this proposition are virtually limitless in number." It is also rightly stated in the same footnote that the following decisions "is a small sampling of them": *Hartford Steam Boiler Inspection and Insurance Co.* v. *Harrison,* (1937) 301 U.S. 459; *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp.,* (1936) 299 U.S. 183; *Colgate* v. *Harvey,* (1935) 296 U.S. 404; *State Board of Tax Commissioners* v. *Jackson,* 283 U.S. 527; and *Corporation Commission of Oklahoma* v. *Lowe,* (1930) 281 U.S. 431.

[25] *District of Columbia* v. *Carter,* 409 U.S. 418; *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 162; *United States* v. *Price,* 383 U.S. 787; *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715; *Shelly* v. *Kraemar,* 334 U.S. 1; *United States* v. *Classic,* 313 U.S. 299; *Nixon* v. *Condon,* 286 U.S. 73; *Iowa-Des Moines National Bank,* 284 U.S. 239; *Corrigan* v. *Buckley,* 271 U.S. 323, *Truax* v. *Corrigan,* 257 U.S. 254; *Civil Rights Cases,* 109 U.S. 3; *Ex Parte Virginia,* 100 U.S. 339; *Virginia* v. *Rives,* 100 U.S. 313; and *United States* v. *Cruikshank,* 92 U.S. 542.

[26] *Townsend* v. *Shank,* 404 U.S. 282; *Graham* v. *Richardson,* 403 U.S. 365; and *Shapiro* v. *Thompson,* 394 U.S. 618. Indeed, the equal protection clause cannot be used as a bludgeon to compel a state to violate any provision of the Constitution. *Sloan* v. *Lemon,* 413 U.S. 825.

On May 17, 1954, the Supreme Court handed down its unanimous decision in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483. By this ruling the Supreme Court adjudged "that in the field of public education the doctrine of separate but equal has no place." In its final analysis, the decision in the *Brown* case is based upon the proposition that the equal protection clause of the Fourteenth Amendment forbids a state to consider race in assigning children to its public schools, and in consequence a state violates the clause if it excludes a child from any of its schools because of the child's race. Hence, the decision accepts as valid Justice Harlan's assertion in *Plessy* v. *Ferguson* that "our Constitution is color blind."

At the time the decision in the *Brown* case was announced 17 states and the District of Columbia were maintaining segregated schools for black and white children.

It is no exaggeration to say that the decision of the Supreme Court in the *Brown* case shocked the nation. In common with multitudes of other Americans, I doubted its validity and wisdom. Such a drastic change in the interpretation of the equal protection clause, I thought, ought to have been made by a constitutional amendment and not by judicial fiat.

Since the Supreme Court handed down its decision in the *Brown* case, I have spent much energy and much time studying the origin, the history, the language, and the objective of the equal protection clause of the Fourteenth Amendment. My study has constrained me to accept as valid these deliberate and definite conclusions:

The "separate but equal doctrine" is consistent with the origin and history of the equal protection clause.

Nevertheless, the "separate but equal doctrine" is inconsistent with the words and manifest purpose of the equal protection clause.

The equal protection clause requires the laws of a state to treat alike all persons in like circumstances within its borders both in respect to rights conferred and responsibilities imposed.

The objective of the equal protection clause is to insure equality under state law of all persons similarly situated within the borders of the state.

A state frustrtes the equal protection clause and its objectives if it makes the legal right or legal responsibility of persons within its borders depend upon their race.

The *Brown* case requires a state to assign its children to its public schools without regard to their race and invalidates any state law to the contrary.

Despite my original misgivings respecting it, the *Brown* case constitutes a proper interpretation of the equal protection clause.

The equal protection clause governs state action only, and does not apply in any way to the conduct, dealings, associations, social activities, or racial preferences of individuals.

Finally, the equal protection clause contemplates that all persons shall enjoy equal civil liberties under state law, but does not entitle any persons of any race to any special privileges or preferences superior to those accorded to persons of other races by state law.

JUDGE PARKER'S EXPLANATION OF THE BROWN CASE AND THE EQUAL PROTECTION CLAUSE

When the Supreme Court made its decision in the *Brown* case, it decided four separate cases which it had combined for the purpose of hearing and decision. After its decision, the Supreme Court remanded the four separate cases to the courts in which they had originated for further appropriate proceedings.

One of the four cases, *Briggs* v. *Elliott*, involved a challenge to the constitutionality under the equal protection clause of the public schools of Clarendon County, South Carolina. This case had originated in the United States District Court for the Eastern Distict of South Carolina and had been decided in the first instance by a three-judge district court composed of Circuit Judge Parker, and District Judges Waring and Timmerman.[27]

Circuit Judge John J. Parker, who afterwards served as Chief Judge of the United States Court of Appeals for the Fourth Circuit, was deemed by the bench and bar to be one of America's greatest jurists of all times.

After the *Briggs* case was remanded to the United States District Court for the Eastern District of South Carolina by the Supreme Court for further proceedings, Judge Parker wrote what he called a per curiam opinion for the three judge court, which was then composed of himself, Circuit Judge Dobie, and District Judge Timmerman.

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[27] 98 F. Supp. 529, and 103 F. Supp. 920.

In this illuminating opinion, Judge Parker explained the *Brown* case and the equal protection clause with correctness and clarity. In so doing, he said:

"This Court in its prior decisions in this case, 98 F. Supp. 529; 103 F. Supp. 92, followed what it conceived to be the law as laid down in prior decisions of the Supreme Court, *Plessy* v. *Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256; *Gong Lum* v. *Rice*, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172, that nothing in the Fourteenth Amendment to the Constitution of the United States forbids segregation of the races in public schools provided equal facilities are accorded the children of all races. Our decision has been reversed by the Supreme Court, *Brown* v. *Board of Education of Topeka*, 349 U.S. 294, 75 S.Ct. 753, 757, which has remanded the case to us with direction 'to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially non-discriminatory basis with all deliberate speed the parties to these cases.'

"Whatever may have been the views of this court as to the law when the case was originally before us, it is our duty now to accept the law as declared by the Supreme Court.

"(1-4) Having said this, it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of the governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals.

"The Supreme Court has pointed out that the solution of the problem in accord with its decisions is the primary responsibility of school authorities and that the function of the courts is to determine whether action of the school authorities constitutes 'good faith implementation of the governing constitutional principles'." [28]

Judge Parker's sound explanation of the *Brown* case and the equal protection clause was subsequently rejected by the judicial activists on the Supreme Court.

DE JURE AND DE FACTO SEGREGATION

The *Brown* case rightly held that the federal government has no power whatever in respect to the assignment of students to the public schools of a state unless the state discriminates against a child by denying him admission to one of its schools solely because of his race.

Subsequent decisions correctly accept this principle as valid. Under it, segregation of the races in public schools is either de jure or de facto.

De jure segregation, which is subject to federal authority, is an existing condition of segregation in a public school resulting from intentionally segregative action on the part of the school board acting as a state agency, and de facto segregation, which lies outside the bounds of federal authority, is an existing condition of segregation arising out of the custom of American families of different races to establish their homes in communities inhabited by other families of their respective races.[29]

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[28] 132 F. Supp. 776, 777.

[29] *Keys* v. *School District No. 1*, (1973) 413 U.S. 189, 205; *Washington* v. *Davis*, (1976) 426 U.S. 229, 240; *Dayton Board of Education* v. *Brinkman*, (1977) 433 U.S. 406, 413.

THE COMPULSORY INTEGRATIONISTS AND THE DIE-HARD SEGREGATIONISTS

It is necessary to describe the political climate which prevailed in the United States during the years of the civil rights revolution. As I stated on occasions during that time, the constant preoccupation and agitation respecting race impaired our national sanity.

The spirit of moderation, tolerance, and mutual understanding ordinarily characteristic of Americans of all races and all walks of life was largely lacking. People of diverse views respecting racial matters engaged in furious, intolerant, and uncompromising controversies concerning them. These controversies erupted in political and legal battles, and sometimes in physical encounters.

For ease of expression, I call the extremists among one group compulsory integrationists, and those among the other die-hard segregationists. I was not happy with either the compulsory integrationists or the die-hard segregationists, and they were not happy with me. Some of the compulsory integrationists applied to me their most approbrious epithet "racist", and some of the die-hard segregationists called me a "flaming liberal."

Despite their violent disagreements in general, both the compulsory integrationists and the die-hard segregationists spurned my abiding conviction that the Constitution commands that men of all races shall enjoy equality under the law and forbids the grant of special legal rights and special legal privileges to men of one race denied to men of other races.

The thinking of the compulsory integrationists on this score was twisted awry. They had convinced themselves that members of the minority race were entitled to legal rights superior to those of members of the majority race, and their goal was to induce, if not to coerce, Congress and the federal judiciary and agencies to grant members of minority races such superior legal rights.

The die-hard segregationists were equally wrong. They were convinced that the legal status of members of the minority race ought to be inferior to that of members of the majority race, and they acted accordingly.

The compulsory integrationists claimed that they were merely seeking to eradicate from the hearts of all Americans the attitudes and inclinations they deemed to be racial prejudicides or racial preferences. They were bent on accomplishing their objectives by the coercive power of law rather than by the persuasive power of reason or religion. The laws they sought, and in some instances secured, convert innocent external acts into illegal conduct upon the conclusion or supposition of fallible federal officers that the innocent external acts were done with racial discrimination or racial preference.

I strongly disagreed with the compulsory integrationists in this respect. I believed that the true function of law is to outlaw external acts which are evil, and not to regulate the thoughts of men, no matter how erroneous their thoughts may be.

Laws which make innocent external acts illegal solely on the basis of the internal thoughts which may accompany them are dangerous. They are, indeed, the stuff of which tyranny is made.

This is true because the administrators of such laws do not possess the clairvoyant power to determine what is in the human heart. As the Old Testament so well says in I Samuel, Chapter 16, verse 7, "The Lord seeth not as man seeth; for man looketh upon the outward appearance; but the Lord looketh on the heart."

I deemed the demands of the compulsory integrationists unwise for other reasons.

While I abhorred racial prejudice in all its aspects, I entertained the earnest belief that racial prejudice can be effectively removed from the human heart only by reason or religion. Furthermore, I rejected the notion that racial preference is synonymous with racial prejudice. In my judgment, racial preference is inseparable from liberty in some of the most intimate relationships and some of the most significant activities of men of all races.

I also entertained the earnest belief that the means by which the compulsory integrationists sought to impose their objectives on the people of our nation were incompatible with the purpose of the Founding Fathers in drafting and ratifying a written Constitution which divides governmental powers between the federal government and the states.

This purpose was explained with complete fidelity to truth by Chief Justice Salmon P. Chase in *Texas* v. *White*, 1 Wallace (U.S.) 725, when he said: "The Constitution, in all its provisions, looks to an indissoluble union composed of indestructible states."

The ultimate goal of the compulsory segregationists, I believe, was to reduce the states to meaningless and impotent zeroes insofar as the regulation of inter-racial relationships was concerned. Their immediate goal was undoubtedly to persuade federal courts and agencies by specious interpretations of the equal protection clause to compel the states to integrate all their schools racially and thus deny children of all races any liberty to choose the schools they attended.

I deplore the attitude and response of some die-hard segregationists toward peaceful demonstrations by members of the minority races who were seeking to obtain equality of rights under the law.

The First Amendment, which I reverse, gives to both the wise and the foolish a constitutional right to engage in peaceful demonstrations to present their grievances, real or imaginary, to government or the public. Peaceable demonstrations have therapeutic value in all cases.

If the grievances are real, the peaceable demonstrations may persuade government to grant appropriate relief; and if they are imaginary they may relieve the demonstrators of their tensions, in whole or in part.

I abhorred the brutality which die-hard segregationists sometimes visited upon peaceful demonstrators during the civil rights revolution. I was outraged by the attack some die-hard segregationists made upon the demonstrators who were marching from Selma to Montgomery, and publicly stated that they were the most effective allies the compulsory integrationists had.

Both the compulsory integrationists and the die-hard segregationists disliked the *Brown* case. The former did so because it adjudged that the equal protection clause forbade racial discrimination, but did not mandate racial integration; and the latter because it prohibited segregation in the future similar to that of the past.

THE CIVIL RIGHTS ACT OF 1964

Section 5 of the Fourteenth Amendment provides that "the Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

Ten years after the *Brown* case, Congress exercised its power to enforce the equal protection clause insofar as it relates to the assignment of students to state educational institutions. It enacted Title IV of the Civil Rights Act of 1964.[30] Its purpose in so doing was to clarify the role of the federal government in the assignment of students to state schools and bring peace to an America troubled by the bitter controversies between the compulsory integrationists and the die-hard segregationists.

The Title rightly recognized as sound the ruling of the *Brown* case that the equal protection clause forbids a state to practice racial discrimination in assigning students to its educational institutions, but does not empower federal courts or officials to compel states to integrate such institutions in racial proportions pleasing to them. Both the words of the Title and its legislative history are as clear as sunlight in a cloudless day.

Since it was in rapport with the equal protection clause, the Title was well designed to win the approbation of all Americans other than those who are wedded to the obsession that the Constitution should be construed to satisfy their personal notions rather than its own objectives.

By Title IV, Congress regulated what had become known as "desegregation" in public education.

By provisions of Section 401(a) and 407(a), which were incorporated in the Title as it was originally proposed and retained in the title in its final formulation, Congress specified with exactness and completeness what the equal protection clause requires of the state in assigning children or students to its educational institutions, and the role, i.e., the function, of federal courts and federal officers in respect to this state activity.

Section 401(a) in its original and final form expressly declares that " 'desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin."

Section 407(a) in its original and final form explicitly denies the Attorney General power to bring legal proceedings to desegregate the educational institutions of a state unless children "as members of a class of persons similarly situated are being deprived by a school board of the equal protection of the laws", or an individual "has been denied admission to or not permitted to continue at a public college by reason of race, color, religion, or national origin."

Congress could not have found plainer words to enforce the equal protection clause and establish these principles as law for people and rulers alike:

1. The state's obligation in assigning students to its educational institutions is simply to make the assignment "without regard to their race, color, religion, or national origin."

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[30] 42 U.S.C. Sections 2000a—2000h-6.

2. The role, i.e., the function, of federal courts and federal officers is simply to enforce that obligation in case the state fails to perform it.

3. Federal courts and officers have no power in any event to order the state to assign students to its educational institutions on the basis of their "race, color, religion, or national origin."

While Congress was debating on formulating Title IV, many Senators and Representatives expressed concern with the increasing tendency of inferior federal courts and federal officers to order state school boards to assign students to their schools on a racial basis and thus compel them to integrate their schools racially instead of merely preventing racial discrimination.

To allay this concern, Congress added amendments to Title IV as originally proposed to make it doubly certain the Title would prohibit racial integration by the fiat of federal courts and federal officers as well as racial discrimination by the state in the assignment of students to state educational institutions.

One of these amendments was incorporated in Section 401(a) immediately after the Title's original and final definition of what constitutes "desegregation", and consisted of these words: "but 'desegregation' shall not mean the assignment of students to public schools to overcome racial imbalance."

The other amendment was incorporated in Section 407(a), and was expressed in this unmistakable language: "Provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

The proviso did not contain any exception or create any limitation to its applicability. Hence, it applied to all racial imbalances, regardless of whether they resulted from de jure or de facto segregation. Since "all legislative powers granted to the United States" is vested in Congress by Article I, Section 1 of the Constitution, the subsequent nullification of the proviso by federal courts and federal executive officers constituted a gross usurpation of power denied them by the Constitution and statutes they were professing to interpret.

An illuminating colloquy concerning the proviso occurred between Senator Hubert H. Humphrey, the floor manager of the Civil Rights Act of 1964 in the Senate, and Senator Robert C. Byrd, on the floor of the Senate on June 4, 1964 during consideration of the Civil Rights Act of 1964.

Senator Byrd was distressed by the possibility that Title VI of the Act, which primarily governed state programs receiving federal financial assistance, might be utilized by federal courts or federal officers to coerce state school boards to engage in the forced busing of students.

Senator Byrd put this question to Senator Humphrey: "Can the Senator from Minnesota assure the Senator from West Virginia that under Title VI school children may not be bused from one end of the community to another end of the community at the taxpayers' expenses to relieve so-called racial imbalances in the schools."

Senator Humphrey replied: "I do."

The colloquy continued as follows:

Senator BYRD. "Will the Senator from Minnesota cite the language in Title VI which would give the Senator from West Virginia such assurance?"

Senator HUMPHREY. "That language is to be found in another title of the bill, in addition to the assurances to be gained from a careful reading of Title VI itself."

Senator BYRD. "In Title IV?"

Senator HUMPHREY. "In Title IV of the bill."

Senator BYRD. "Will the Senator from Minnesota read that language in Title IV?"

Senator HUMPHREY. "Yes, I would be happy to do so. The provision merely quotes the substance of a recent court decision—the so-called Gary Case."

Senator Humphrey thereupon stated that the language under consideration was embodied in the provisio in Section 407(a), and read to Senator Byrd and the other members of the Senate the proviso verbatim in its entirety. The colloquy continued:

Senator BYRD. "What does the word 'herein' mean?"

Senator HUMPHREY. "It means within the Act."

Senator BYRD. "Does it mean the act or the title?"

Senator HUMPHREY. "It means the act. If the Senator would like to offer an amendment, if he believes we have not been sufficiently precise, I wish he would do so. As Senator in charge of the bill, I would entertain such an amendment."

Senator BYRD. "But would the Senator from Minnesota also indicate whether the words 'provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance' would preclude the Office of Education (of the Department of HEW), under Section 602 or Title VI from establishing a requirement that school boards and school districts shall take action to relieve racial imbalance wherever it may be deemed to exist?"

Senator Humphrey: "Yes. I do not believe in duplicity. I believe that if we include the language in Title IV, it must apply throughout the act."

After elaborating the fact that the drafters of the proviso had modeled it on the language of Judge Beamer's opinion in *Bell* v. *School Board of Gary*, (D.C. Indiana, 1963) 213 F.Supp. 819, Senator Humphrey assured Senator Byrd in particular and the Senate in general that the proviso forbade federal courts and federal executive officers to require state school boards to bus students to effect the racial integration of schools. He did so by assertions which are intellectually indisputable. He said:

"I should like to make one further reference to the *Gary* case. This case makes it clear that while the Constitution prohibits discrimination, it does not require integration. The busing of children to achieve racial balance would be an act to effect the integration of schools. In fact, if the bill were to compel it, it would be a violation, because it would be handling the matter on the basis of race and we would be transporting children because of race. The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the school systems."[31]

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[31] Congressional Record, vol. 110, P. 10, pp. 12,713-12,717. Although the provisions of Title IV of the Civil Rights Act of 1964 were in rapport with the true meaning and real objective of the equal protection clause, I voted against the Act for reasons stated by me in detail while the legislation was under Senate consideration. Some of these reasons had their origin in provisions of the Act, and others were prompted by apprehensions as to how it would be applied by courts and executive agencies.

While many of them are not germane to my specific subject, I deem it not altogether amiss to epitomize some of them in this note.

The Act is in irreconcilable conflict with the principle that all Americans of all races are entitled to equal rights under both federal and state laws. It deprives all Americans of precious rights for the supposed benefit of members of minority races, and it subordinates other precious rights of all Americans to demands made by or in the name of members of minority races.

To be sure, the Act pays some lip service to the concept of equality. In so doing, however, it is reminiscent of Anatole France's assertion: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

The Act was devised with the understanding that in its practical administration it would be employed to extend to members of minority races special privileges not accorded to others. It is being so administered.

The Act violates with vengence the doctrine of the separation of powers, which wisely discountenances the merger of powers to make, enforce, and interpret laws in a single public official or single public body.

It does this by combining in the federal agencies charged with its administration and enforcement these discordant powers: (1) The legislative power to write regulations having the force of law; (2) the executive power to administer and enforce its provisions and these regulations, and to prosecute violations of them; and (3) the judicial power to judge and punish these violations.

The combination of these discordant powers in the federal agencies make them, in reality, judges in their own causes. As a consequence, they cannot act with the cold neutrality of the impartial judge, and those subjected to their jurisdiction are denied due process and fair play.

These provisions of the Civil Rights Act of 1964 are repugnant to my philosophy of government and my enduring conviction that freedom is the most precious value of civilization.

Apart from other considerations, they determined me to vote against the Act. There were other considerations. But they strongly reinforced my determination.

I had grave apprehensions as to how HEW, EEOC, and other federal executive agencies would interpret and apply the Act, and as to how the Supreme Court would react to the effort of its Title IV to put restraints on judicial and bureaucratic abuse of the equal protection clause in the assignment of students to state schools.

Another consideration arose out of my realization that the enactment of the Civil Rights Act was another step in the process by which the power-hungry federal government was undertaking to destroy the states as viable instruments of government and concentrate in itself the power to dominate the lives of Americans in virtually all respects.

This consideration has long been of profound concern to me. It ought to be of similar concern to every American who does not relish the prospect of having his status reduced to that of a galley-slave pulling an oar in the ship of state.

My gravest apprehensions have materialized since the passage of the Act. HEW, EEOC, and other federal executive agencies have stretched the drastic provisions of the Act far beyond the intent of Congress, and converted what it intended to be a prohibition of racial discrimination into a mandate for racial integration.

By so doing, HEW, EEOC, and other federal executive agencies have arrogated to themselves dictatorial powers, and are exercising them daily throughout our nation to impose their notions on states, subdivisions of states, educational institutions, industries, labor organizations, and individuals.

THE GREEN CASE

While the "separate but equal doctrine" was deemed constitutional, New Kent County in rural Virginia maintained two racially segregated schools, one a combined elementary and high school for blacks known as Watkins School and the other a combined elementary and high school for whites known as New Kent School.

In 1965, the County School Board of New Kent County adopted a freedom-of-choice plan for the assignment of children to its schools. This plan permitted every child, regardless of his race, to attend whichever school he chose, and provided him free transportation to enable him to do so.

In exercising their freedom of choice, all of the white students and 15 percent of the black children decided to attend New Kent School, and 85 percent of the black children elected to attend the Watkins School.

The Supreme Court repudiated the freedom-of-choice plan of New Kent County as unconstitutional under the equal protection clause in *Green* v. *County School Board of New Kent County,* (1968) 391 U.S. 430.

Although Title IV of the Civil Rights Act of 1964 had been the supreme law of the land for almost four years, the *Green* case totally ignored its provisions, and dismissed the Act as a whole with the nonchalant remark that it simply indicated that Congress was "concerned with the lack of progress in school desegration." [32]

When I was a small boy, my father, who revered the rule of law, took me to the old Supreme Court room in the Capitol at Washington and told me: "Here is where the Supreme Court sits. The Supreme Court will be faithful to the Constitution though the heavens fall." As a result of this childhood experience, I do not find it easy or pleasant to be critical of the Supreme Court, even when it practices verbicide on the words of the Constitution.

I have scrutinized the opinion in the *Green* case on many occasions, and will reluctantly comment on it with complete candor.

The opinion reflects anger rather than calm reasoning, and illustrates judicial activism and verbicide run riot. It is replete with specious arguments which bear virtually no relationship to the constitutional provision it undertakes to construe and apply.

It ignores the plain words of that provision which expressly restrict their coverage to the states, and applies them to those individuals who happen to be school children in assignment cases. It does this by adjudging that the equal protection clause denies these individuals the freedom to choose the schools they attend.

Its language reveals why the Justices impose this limitation upon the freedom of the children. The Justices apprehend that their natural inclination to have daily associates who are members of their own race will deter both black and white children from voluntarily mixing themselves in the schools in racial proportions pleasing to the Justices.

The opinion claims that the Court is merely applying the *Brown* case and its implementing decision, *Brown II,* (1955) 349 U.S. 483. The *Green* case does recognize these rulings of the *Brown* case: First, the equal protection clause does make racial discrimination in public education unconstitutional; and second, that the equal protection clause confers no power whatever on the federal government to take any action in respect to the assignment of children to state schools unless the state discriminates against a child by excluding him from one of its schools on account of his race.

Otherwise the *Green* case is totally repugnant to the Brown Case. It rejects the ruling of the *Brown* case that the equal protection clause requires the state to ignore race in assigning children to its schools and to make such assignments solely on a non-racial basis, and adjudges that the clause compels the state to give priority to the race of children in assigning them to its schools and to make such assignments on a racial basis.

It also rejects the ruling of the *Brown* case that the equal protection clause merely empowers the federal government to prohibit an offending state from practicing further racial discrimination, and adjudges that the clause imposes upon an offending state the affirmative obligation to integrate all its schools racially.

The *Green* case creates a special rule for the 11 states of the old Confederacy and the six nearby border states which were maintaining dual systems of racially segregated schools on May 17, 1954. These states, it declares, must destroy "root and branch" all vestiges of past racial discrimination by converting their former dual systems into unitary school systems. This obligation is consummated, it further declares, only when the racial mixture in its schools renders them unidentifiable as "white schools" or "negro schools" and makes them identifiable solely as "just schools."

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[32] 391 U.S. 430, p. 433, footnote 2. The *Green* case is analyzed with candor, courage, and correctness by Lino A. Graglia in his Disaster By Decree, The Supreme Court Decisions On Race And The Schools (Chapter 5), which was published by the Cornell University Press and merits reading by all Americans who abhor judicial tyranny.

The Supreme Court has subsequently defined a unitary school in less lucid terms as one in "which no person is to be effectively excluded from any school because of race or color." [33]

The Supreme Court's invalidation of freedom-of-choice in the *Green* case cannot be reconciled with this definition. After all, however, judicial aberrations can never be reconciled with constutional government.

The *Green* case illustrates in graphic fashion the tragic truth that many men of good intentions entertain an insatiable desire to impose their personal notions on others, and cannot be safely trusted with unlimited and unsupervised governmental power.

The subsequent non-busing decisions of the Supreme Court followed the *Green* case. They accepted its philosophy that the Constitution is color conscious rather than color blind, and its ruling that the equal protection clause obligates an offending state school board to take affirmative action to mix the races in its schools if both black and white children reside within its jurisdiction.

Inasmuch as they follow the *Green* case, a detailed analysis of those subsequent cases would not increase an understanding of the problems arising out of the forced busing of school children for integration purposes. Hence, further reference to them is omitted.

CHASTISING THE SOUTH

I use the term South to embrace the States of the Old Confederacy and the nearby border states having similar school laws. These states did not possess sufficient prophetic power to know in advance that the *Brown* case was going to invalidate as unconstitutional under the equal protection clause the "separate but equal" doctrine which had been held valid in all governmental circles, federal and state, during the preceding 86 years. Consequently, they were still operating legally segregated dual systems of schools on May 17, 1954, the day of the *Brown* decision.

The compulsory integrationists initiated their activities by concentrating on the segregated schools of the South and disregarding segregation in schools elsewhere. By so doing, they enlisted the aid of politicians in other parts of the nation who found it politically profitable to chastise the distant South for its actual or supposed sins, and to ignore the similar shortcomings of those exercising governmental power in their own states.

The compulsory integrationists and their allies were delighted with the *Green* case because it gave the Supreme Court's blessing to the chastisement of the South. In it, the Supreme Court Justices invented drastic new rules applicable to the South only, and ordered inferior federal courts sitting in the South to abandon the "deliberate speed approach" of *Brown II,* and compel state school boards in the South to obey the new rules at once.

Acting under the *Green* case and subsequent Supreme Court decisions following it, federal courts sitting in the South and federal agencies, notably HEW, required state school boards to take various actions, some quite artificial and some quite expensive to state taxpayers, which they deemed likely to speed racial integration in their schools.[34]

I enumerate some of their requirements. They compelled state school boards to deny hundreds of thousands of children, black and white, admittance to their nearest schools, and to attend what they called satellite schools which they "clustered, grouped, or paired" with their neighborhood schools, often in distant and noncontiguous areas; to restructure the boundaries of districts and attendance zones to secure the maximum amount of racial mixing, often in ways incompatible with the terrain and customary routes of travel; to close existing schools in communities inhabited by families of one race, and to consolidate their student bodies with those of student bodies in schools in communities populated by families of the other race; and to build new schools in or adjacent to areas where families of both races resided.

All to often the interests and well being of children, parents, taxpayers, and eduation were sacrificed to accomplish integration.

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[33] *Alexander* v. *Holmes County Board of Education,* (1969) 396 U.S. 19. See, especially, headnote 1 of the report of this case in 24 L.Ed.2d, pp. 19, 20.

[34] Lino A. Graglia: Disaster By Decree, Chapters 1-6, pp. 1-103.

While the South was being treated in this fashion, the Supreme Court, inferior federal courts sitting in other parts of the land, and federal agencies virtually ignored racial segregation in the schools of the North, the East, and the West, notwithstanding such segregation in schools of their inner cities was usually far more pronounced than in southern communities.

Even after they abandoned "the separate but equal" doctrine in good faith and opended their schools without discrimination to students of all races, schools boards in the South found little surcease from chastisement. This was true because racial imbalances in Southern schools are presumed to result from de jure segregation, while racial imbalances in Northern, Eastern or Western schools were either ignored or presumed to be caused by de facto segregation.

The disparity of treatment of the various areas of our country justifies this caustic comment. While the American Creed was proclaiming that our land was "one Nation under God", the Supreme Court and federal agencies were ruling that the South and other parts of our country were not one nation under the Constitution.

The disparity of treatment prompted Senator John C. Stennis and me to offer two amendments, which passed the Senate. My amendment decreed that rules of evidence in school desegregation cases in all federal courts should be uniform. The Stennis Amendment commanded federal courts and agencies to apply to school segregation throughout the country identical regulations.

The Stennis Amendment provoked an indignant outcry from a few Northern Senators. Thereupon Senator Abraham Ribicoff, of Connecticut, as just a man as ever sat in the Senate, arose in support of the amendment. He declared, in essence, with much eloquence that the Stennis Amendment placed a mirror before Senators who favored integration in the South and disfavored it in the North, and enabled them to see their hypocrisy.

FORCED BUSING

I digress momentarily to emphasize a relevant psychological truth.

When contending groups who entertain different views and seek different ends use the same words to express their contradictory ideas and aims, they produce a lack of public understanding of their differences and the impact which the triumph of one group or the other will have on the way of life of our country.

Advocates and opponents of compulsory integration of schools have used the same word, "desegregation", to express their irreconciliable ideas and incompatible goals. The federal judiciary has added to the lack of public understanding by using the same word, "desegregation", as if it had a single definite meaning.

Opponents of compulsory integration habitually attribute to the word "desegregation" a meaning identical with that given to it by the Supreme Court in the *Brown* case and Congress in Title 4 of the Civil Rights Act of 1964. To them, "desegregation" means the assignment of pupils to state schools without regard to their race. To the compulsory integrationists, on the contrary, "desegregation" means the assignment of students to state schools because of their race.

The differences between the two groups are not mere matters of semantics. They reflect a most serious conflict of ideas and demands in respect to the governmental powers delegated to the federal government and reserved to the states by the Constitution, and with respect to whether the Constitution forbids or countenances federal tyrannies which rob innocent children and their inoffending parents of freedom.

The contending groups agree on only one proposition, i.e., that the equal protection clause confers no power upon the federal government to take any action concerning the assignment of students to state schools unless the state commits racial discrimination by denying a child admittance to one of its schools solely on account of his race.

The contending groups insist, however, that the equal protection clause confers on the federal government totally divergent powers in respect to a state school board if it is guilty of racial discrimination in the manner specified.

According to the opponents of compulsory integration, the equal protection clause directs the federal government to require the offending state school board to remedy the consequences of its racial discrimination and to refrain from racial discrimination in the future; and according to the advocates of compulsory integration, the equal protection clause compels the federal government to assume complete control of the assignment of students to schools subject to the jurisdiction of the offending school board, and to compel the board to assign students to its school in racial proportions to the maximum extent feasible.

I return to the narration of events.

Notwithstanding its drastic nature, the *Green* case was not calculated to produce integration in the schools of the South to a degree pleasing to compulsory integregationists.

Their desire was frustrated by two factors. One, which had its genesis in what seems to be an inborn human characteristic, was the custom of American families of all races to establish their homes in communities inhabited by families of their respective races; and the other, which had its origin in a dislike for compulsory integration, was the tendency of American white families to flee from the inner cities to the suburbs.

Segregation in public schools resulting from these factors is obviously de facto segregation. It is caused by the exercise of free choice by individuals and not by segregative acts of state school boards.

Nevertheless, the origin of segregation in the public schools of these racially segregated residential communities has not usually exempted their schools from federal regulation under the principle that de facto segregation in state schools is not subject to federal jurisdiction. This has been true because these schools have ordinarily been located in state school districts larger than the residential communities they serve. As a consequence, the federal government has usually been able to assume jurisdiction over them either on the basis of evidence of racial discrimination in other schools of their district or on the basis of the assumption that the segregation in them represented racial imbalances presumed to result from the segregative acts of school boards.

The only practicable way for the federal government to integrate state schools in residential communities racially segregated by the voluntary choices of their places of abode by their inhabitants is to resort to forced busing of students.

The forced busing of students for these purposes involves these two successive acts of compulsion: First, denying school children admittance to their neighborhood schools; and, second, assigning and transporting them to schools elsewhere.

Although various reasons are given for it, the real objective of forced busing is to integrate the bodies rather than to enlighten the minds of school children.

Ordinarily forced busing involves and exchange of black and white children. Black students are barred from their neighborhood schools, and compelled to attend schools in communities inhabited by whites; and white children are barred from their neighborhood schools and compelled to attend schools in communities populated by blacks.

On April 20, 1971, the Supreme Court handed down its decision in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1. By this decision, the Supreme Court adjudged for the first time that the federal judiciary may constitutionally employ forced busing as a tool of school desegregation.

The *Swann* case was originally heard by Chief Judge J. Braxton Craven, Jr. in 1965. He ruled that the geographic zoning plan of the Charlotte-Mecklenburg Board of Education satisfied the equal protection clause as it had been interpreted in the *Brown* case. In so ruling, he made this observation:

"This is another school case. Our adversary system of justice is not well-adapted for the disposition of such controversies. It is to be hoped that with the implementation of the 1964 Civil Rights Act the incidence of such cases will diminish. Administrators, especially if they have some competence and experience in school administration, can more likely work out with School Superintendents the problem of pupil and teacher assignment in the best interests of all concerned better than any District Judge operating within the adversary system. The question before this court, even within its equitable jurisdiction, is not what is best for all concerned but simply what are plaintiffs entitled to have as a matter of constitutional law. What can be done in a school district is different from what must be done."[35]

After Judge Craven's sound ruling, the Supreme Court handed down its decision in the *Green* Case and similar decisions in *Monore* v. *Board of Commissioners,* (1968) 391 U.S. 430; *Alexander* v. *Holmes County Board of Education,* (1969) 396 U.S. 19; and *Carter* v. *West Felicana Parish School Board,* (1970) 396 U.S. 1032. These cases ruled that state school boards in the South had an affirmative duty to eradicate at once "root" and "branch" all vestiges of segregation resulting from their former dual systems of schools and that they could do this only by mixing the races in their schools without delay to the maximum degree feasible.[36]

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[35] *Swann* v. *Charlotte-Mecklenburg Board of Education,* (1965) 243 F.Supp. 667, affirmed 369 F.ed 29 (1966).

[36] *Monroe* v. *Board of Commissioners,* (1968) 391 U.S. 450, which adjudged a "free transfer" plan to be invalidated by the equal protection clause, reinforces the holding of the *Green* case that the desegregation of public schools demands that school children be robbed of their freedom, and demonstrates the falsity of any claim that federal courts which enter desegrega-

The Constitution had not been changed since *Brown*, but the Supreme Court Justices had altered their notions as to what was constitutional or desirable.

The Supreme Court did not spell out the rationale underlying its new decisions, or the reason why the Constitution now covered the South in a different way from the North, East, and West.

The inference concerning the rationale underlying the new judicial fiat was nevertheless inescapable. It was that the South had been practicing racial discrimination during all the times it had relied upon the "separate but equal doctrine", even thought Supreme Court Justices had not been smart enough to know it until May 17, 1954, the day of the *Brown* case.

Despite the humor in it, this rationale was legally sound. As Dean Samuel F. Mordecai, of the old Trinity (now Duke University) Law School, was wont to say: "The law makes queer distinctions between the obligations it imposes on different categories of men. It requires the layman to know all the law, and the lawyer to know a reasonable amount of the law. But it doesn't require the judge to know a damned thing."

After the Supreme Court handed down the *Green*, the *Monroe*, the *Alexander*, and the *Carter* cases, the *Swann* case was reinstituted, and James B. McMillan, a conscientious and erudite United States District Judge, heard it.

As one of the inferior members of the federal judicial hierarchy, Judge McMillan was required to follow and apply in the re-instituted *Swann* case the new rulings of the head of the federal judicial hierarchy, the Supreme Court.

The defendant in the *Swann* case, the Charlotte-Mecklenburg Board of Education, had administrative jurisdiction of the Charlotte-Mecklenburg School system, which encompassed the City of Charlotte and Mecklenburg County, N.C., served the educational needs of the more than 600,000 people residing in them, and was the 43rd largest public school system in the United States.

The area allotted to the system was large, comprising 550 square miles and extending 22 miles east-west and 36 miles north-south. Seventy-one percent of the people inhabiting the area were white and the other 29 percent were black.

The Charlotte-Mecklenburg School system operated 109 schools, and served more than 84,000 pupils. Of the 24,000 black children attending these schools, 21,000 attended schools within the city of Charlotte, and two-thirds of those 21,000—about 14,000—attended 21 schools, where the student bodies were either totally or more than 99 percent black.

After protracted hearings, Judge McMillan ruled that the Charlotte-Mecklenburg Board of Education was impermissibly operating a dual system of schools in violation of the *Green* case and like decisions, and entered a "desegregation order" requiring it to assign administrators, teachers, and students to the schools throughout the system as nearly as practicable in racial proportions corresponsing to the population of the area, i.e., 71 percent white and 29 percent black.

By Judge McMillan's order, the Charlotte-Mecklenburg Board of Education was mandated to bus thousands of students an average "daily roundtrip" approximately "15 miles through central city and suburban traffic" to mix the races in its schools. Many of them were little tots.[37]

By the desegregation order, the Charlotte-Mecklenburg Board of Education was specifically commanded to do these things:

1. To deny thousands of students, both black and white, admission to their neighborhood schools.
2. To assign these children to clustered, grouped, paired, or satellite schools throughout the area in the racial percentages specified insofar as that was practicable.

The order expressly commanded that the Charlotte-Mecklenburg Board of Education transport to the schools to which they were assigned all students who did not live within walking distance of such schools.

The defendant appealed from the order to the United States Court of Appeals for the Fourth Circuit, which vacated the order and remanded the case to the District Court for further proceedings conforming to its opinion.

Although it deemed the order to be required in most respects by the decisions in the *Green* case and those following it, the Circuit Court's ruling was based on its

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tion orders are not applying the clause to individuals in violation of its express declaration. In it, the Court declares: "We do not hold that 'free transfer' has no place in a desegregation plan. But like 'freedom of choice', if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system, it must be held unacceptable." By these words, the Court makes a mockery of "freedom." No human being has any "freedom" if he has to exercise it according to the dictates of government.

[37] *Swann* v. *Charlotte-Mecklenburg Board of Education*, (1970) 431 F.2d. 138, 147.

conviction that the busing it mandated was excessive, and for that reason not required to make the Charlotte-Mecklenburg system a "unitary" system whtin the purview of the *Green* and kindred cases. As the Circuit Court pointed out, the order increased by 39 percent for integration purposes the busing being used by the school board for educational purposes, and necessitated an increase of 32 percent in the school board's fleet of buses.[38]

The Supreme Court reversed the case on certiorari, and upheld Judge McMillan's order in its entirety.

Before discussing the constitutional infirmities in its ruling respecting the forced busing of school children for integration purposes, it is advisable to note what the Supreme Court adjudged in the *Swann* case in respect to the other questions presented to it.

Like the options in the *Green, Monroe, Alexander,* and *Carter* cases, the Supreme Court opinion in the *Swann* case pays lip service to the *Brown* case by asserting that it is following the decision in it. It does quite rightly assert that the federal judiciary acquires no power under the equal protection clause unless the state school board violates the clause (page 15); that its power in such case is limited to correcting the condition that offends the clause (page 15); and that its function in exercising its power is merely "to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race" (page 23).

After making these assertions, the Supreme Court repudiated the *Brown* case, and adjudged that when a state school board violates the equal protection clause its constitutional obligation to assign students to its schools without regard to race is forthwith converted into a constitutional obligation to assign all students to its schools on the basis of race and in so doing to mix them racially to the maximum extent feasible.

To the decree this metamorphosis of the equal protection clause, the Supreme Court perverted the words and objective of the equal protection clause and nullified section 401(a) of the Civil Rights Act of 1964 (42 U.S.C. section 2000c).

It perverted the words and objective of the equal protection clause by converting its prohibition of racial discrimination to separate the races into a requirement of racial discrimination to mix them.[39]

Section 5 of the Fourteenth Amendment provides that the Congress shall have the power to enforce, by appropriate legislation, the provisions of the Amendment.

When Congress enacted Title IV of the Civil Rights Act of 1964, it exercised this power insofar as it relates to the assignment of students to state schools. Its purpose in so doing was to define the role of the federal government in what had become known as "desegregation" of the schools, and restore a measure of racial peace to an America troubled by the bitter controversies between compulsory integrationists and die-hard segregationists in respect to public school systems.

Section 401(a) of Title IV of the Civil Rights Act of 1964 (42 U.S.C. section 2000c) was in perfect rapport with the equal protection clause when it described desegregation as the assignment of students to state schools without regard to race. Consequently, it constituted the supreme law of the land under Article VI of the Constitution.

Hence the Supreme Court unconstitutionally nullified the supreme law of the land and thwarted the effort of Congress to bring some peace to a troubled America when it repudiated the definition of "desegregation" set out in section 401(a) of the Civil Rights Act of 1964 (42 U.S.C. section 2000c), and decreed that "desegregation" is the assignment of students to state schools on a racial basis.

Inasmuch as it holds that the forced busing of students is a constitutionally permissible way to integrate state schools, the Supreme Court decision in the *Swann* case has other infirmities.

Two of its additional constitutional informities may be epitomized as follows:

1. The *Swann* case adjudges that the federal judiciary has power to compel state school boards to violate the equal protection clause.
2. The *Swann* case rules that the federal judiciary has power to apply the equal protection clause to individuals, notwithstanding its coverage is expressly restricted to states and state officials.

When it enters a forced busing decree, the federal district court initially commands the school board to divide the students in a particular district or attendance zone into two groups; to permit the students of the first group to attend their neighborhood schools in the district or zone; and to deny the students in the second group admission to such neighborhood schools.

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[38] Judge McMillan's ruling in the *Swann* case is reported in 311 F.Supp. 265 (1970), and the ruling of the Circiut Court vacating it in 431 F.2d 138 (1970).

[39] Lino A. Graglia: Disaster By Decree, Chapter 5, p. 59.

The most sophisticated sophistry cannot wash out the plain truth that this initial command requires the school board to treat the students in the two groups, who are similarly situated because of their residences in the same district or zone, in a different manner, and that is exactly what the equal protection clause was put in the Constitution to prevent.

The forced busing decree secondarily commands the state school board to assign the students in the second group to schools in other areas and to transport them by buses to the schools to which it assigns them in order either to decrease the number of children of their race in their neighborhood schools or to increase the number of children of their race in the schools elsewhere.

Again, the most sophisticated sophistry cannot wash out the plain truth that the second command of the forced busing decree requires the state school board to deny the students in the second group admission to their neighborhood schools solely on account of their race, and that is exactly what the Supreme Court rightly ruled in the *Brown* case is a violation of the equal protection clause.

A sound rule of constitutional and statutory construction is embodied in the Latin phrase expressio unius est exclusio altrius, meaning the expression of one thing is the exclusion of another. The equal protection clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Manifestly the clause applies exclusively to states and public officers acting for them, and excludes individuals from its coverage.

Notwithstanding this, the forced busing decrees of federal district courts apply the equal protection clause as it is now interpreted by the Supreme Court to hundreds of thousands, perhaps millions, of public school students and their parents each school day. To maintain otherwise is to deny and defy obvious truth.

When it enters a forced busing decree, the federal district court orders the state school board to integrate its schools by the two-fold process of denying selected groups of students admission to their neighborhood schools and by busing them to other schools elsewhere. These decrees clearly apply to these students and their parents because they subject them to punishment for contempt of court if they disobey them or obstruct their execution.

The direct application to the students of the first step in forced busing, i.e., their exclusion from their neighborhood schools, is too obvious to require any explanation. The application to students and parents of the second step, i.e., the busing itself, is more intricate, and is made more understandable by some elaboration.

While the judges responsible for the forced busing decrees are still snug in their beds, the parents of the students to whom the decrees apply are compelled to arise from their beds, and to arouse their children from their slumbers, prepare and serve them breakfasts, and send them outdoors, no matter how inclement the weather may be, to await the arrival of the buses. The students, who are often small tots, are compelled to take round trips, which are often long and wearisome, each school day between their homes and often distant schools in other communities. All of this is done to mix the bodies of the students in racial proportions the federal judiciary deems desirable.

Such unrestrained exercise of judicial power, I submit, has no rightful place in an America, which boasts in its national anthem that it is the land of the free, unless it is indispensable to the nation's well being.

No such case can be made for forced busing of students for integration purposes.

Let us examine the reasons advanced by the advocates of forced busing to justify it.

In the ultimate analysis, they are two in number. The first one, which is untrue as well as a rank insult to blacks, is that black children cannot possibly acquire an adequate education unless they have the coerced companionship of white children while they are attending school.

The second reason is that schools in communities predominatly inhabited by whites are academically superior to the schools in communities predominantly populated by blacks; that black children are, therefore, denied educational opportunities equal to those of white children; and that the only way to remedy past deficiencies in the education of black children and to secure them educational opportunities equal to those of white children is forced busing, which transfers some black children from inferior schools in black communities to superior schools in white communities, and some white children from superior schools in white communities to inferior schools in black communities. Advocates of forced busing exhibit no concern for the plight of the white children who are transferred by it from superior schools in white communities to inferior schools in black communities.

They are indifferent to the inescapable conclusion that on the basis of their own premise this forced busing denies these children equal educational opportunities.

The reasons assigned by the advocates of forced busing are specious and not authentic. The only intelligent remedy for past deficiencies in education is remedial education; and the only intelligent way to secure equal educational opportunities for all children, black and white, is to establish adequate schools in all areas.

The substitution of forced busing for intelligent solutions of educational problems calls to mind the remark of Pope Julius III to the Portuguese monk: "Learn, my son, with how little wisdom the earth is governed."

In an effort to make forced busing more acceptable, the opinion of the Supreme Court in the *Swann* case observed that the District Court had found that the forced busing trips of most elementary school students would take "not over 35 minutes at the most", and that about 39 percent of the nation's public school children were "transported to their schools by bus in 1969-1970 in all parts of the country."

The District Court's finding respecting the time required for the forced busing trips of elementary school students, it seems, was applicable to one way rather than round trips. Be this as it may, it did not embrace the time spent by such students at both ends of their journeys waiting for buses. The time expended in waiting for buses and traveling on them, I submit, is wasted, and ought to be utilized to enlighten their minds in classrooms in schools nearest their homes.

To be sure, state school boards necessarily bus multitudes of students from distant homes to the nearest schools available to them for educational purposes. The distinction between necessary busing for educational purposes and the unnecessary and wasteful forced busing sanctioned by the Supreme Court in the *Swann* case is as wide as the gulf which yawns between Lazarus in Abraham's bosom and Dives in hell. The untold millions of dollars wasted in financing forced busing ought to be spent to improve school facilities, enlarge the teaching skills of teachers, and to provide students with learning aids.

The opinion of the Supreme Court in the *Swann* case stamps with its approval the judicial discrimination of applying different rules of evidence to desegregation cases in the South and those in other parts of the nation. It does so by this ingenious observation: "In a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition."

A case can be made for the proposition that the Supreme Court's decision in the *Swann* case also violated the supremacy clause of Article VI of the Constitution when it nullified the proviso of Section 407(a) of the Civil Rights Act of 1974 (42 U.S.C. section 2000c-6). This proviso forbids federal officers and courts to order transportation of students to achieve a racial balance in any school.

The defendant in the *Swann* case had invoked this proviso as a prohibition on forced busing for integration purposes.

As the colloquy of June 6, 1964, between Senator Humphrey, the Senator in charge of the legislation in the Senate, and Senator Byrd, of West Virginia, and all the other legislative history of the legislation, reveals, Congress actually intended this proviso to outlaw forced busing for integration purposes. Moreover, a case can be made for the proposition that the words of the proviso, properly interpreted, sufficed to achieve this congressional purpose.

Be this as it may, the Supreme Court nullified the proviso of Section 407(a) as it had the rightful definition of desegregation of Section 401(a) by arguments totally incompatible with both the words and the legislative history of these sections.

The first of these arguments was self-contradictory. It was that Congress enacted these sections "not to limit but to define the role of the Federal Government in the implementation of the *Brown I* decision." How Congress can define the role, i.e., the function, of the federal government in a particular activity without defining the limits of its powers in respect to that role is a linguistic impossibility.

The second of these arguments is equally as baffling. It was that Congress inserted the proviso in Section 407(a) "to foreclose any interpretation of the Act as expanding the existing powers of federal courts to enforce the Equal Protection Clause." After stating this argument, the Supreme court promptly expanded the powers of the federal judiciary in this respect by nullifying the limitation the proviso imposed on federal officers and federal courts.

In the final analysis of its confusing words, the third of these arguments was that in enacting the nullified sections, Congress was a bunch of legislative fools attempting to regulate something it had no constitutional authority to regulate, i.e., de facto segregation.[40]

During the times when the Supreme Court was concerned about racial segregation in public schools in the South and was ignoring racial segregation in public schools in other regions, I offered amendments to an education bill to outlaw forced busing for integration purposes.

In arguing unsuccessfully for the adoption of these amendments, I stated, in substance, that I wanted to warn Northern, Eastern, and Western Senators that when the compulsory integrationists had reduced the South to a state of total vassalage, they would not emulate Alexander the Great and weep because there were no more worlds for them to conquer; but that, on the contrary, they would direct their efforts to the public schools of the North, East, and West.

My prophesy proved true. The Supreme Court finally realized that the equal protection clause applies to other parts of the country as well as to the South, and that forced busing constituted the only practical way of mixing the races in the public schools of the North, East, and West.

After the federal courts in these areas began to assume jurisdiction of suits for forced busing, a highly respected Northern Senator, who had spoken and voted against my amendments, offered a proposal to amend the Constitution to prohibit the forced busing of students to integrate public schools. I thereupon went to him and made this private comment: "I'm glad you've seen the light." He made this private response to me: "Yes. It's just as you predicted. They're goring my ox now."

After it announced its decision in the *Swann* case, the Supreme Court rendered a number of other rulings upholding federal district court orders requiring the forced busing of public school students to integrate school systems in virtually all sections of the country where people of different races reside. These rulings are subject to the same infirmities as the *Swann* case, and require no analysis in detail.[41]

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[40] In enacting Title IV of the Civil Rights Act, Congress was exercising its constitutional power to regulate de jure segregation in state schools. It was not usurping the power to regulate de facto integration in them. These assertions, I maintain, are established by both the language and legislative history of the Title. As a member of the Senate, I spent virtually every minute in that body while it was considering Title IV and heard virtually every word spoken by any Senator concerning it. By so doing, I acquired knowledge of the Act's legislative history first hand. After the Supreme Court granted certiorari to review the *Swann* case, I joined Senator Ernest F. Hollings, of South Carolina, and Representative Charles R. Jonas, of North Carolina, in filing with it as amici curiae a brief in behalf of the Charlotte-Mecklenburg Classroom Teachers. As uncompensated attorneys for them, we insisted that the exclusion of students from their neighborhood schools and their forced busing for integration violated the equal protection clause. In preparing the brief I made a meticulous study of the legislative history of Title IV. I was shocked by the Supreme Court's use of the de facto argument to invalidate a valid act of Congress, and made a second meticulous study of the legislative history of Title IV to determine whether the Supreme Court's insupportable argument had any basis whatever.

[41] By ignoring Title IV of the Act in the *Green* case and nullifying it in the *Swann* case, the Supreme Court exhibited its determination to impose the personal notions of its members in respect to matters having racial implications upon the people of our country, anything in the Constitution and laws of the United States to the contrary notwithstanding.

This is undoubtedly a drastic assertion. Its truthfulness is fully corroborated, however, by these additional decisions of the Supreme Court:

a. *South Carolina* v. *Katzenbach,* (1966) 383 U.S. 301.
b. *Katzenbach* v. *Morgan,* (1966) 384 U.S. 641.
c. *Jones* v. *Alfred H. Mayer Co.,* (1968) 292 U.S. 409; *Sullivan* v. *Little Hunting Park, Inc.,* (1969) 396 U.S. 229; *District of Columbia* v. *Carter,* (1973) 409 U.S. 418 (dicta); and *Tillman* v. *Wheaton-Haven Recreation Association,* (1973) 410 U.S. 431.
d. *Johnson* v. *Railway Express Agency,* (1975) 421 U.S. 454; *Runyon* v. *McCrary,* (1976) 427 U.S. 160; *McDonald* v. *Santa Fe Trail Transportation Company,* (1976) 427 U.S. 160.
e. *United States Steel Workers of America* v. *Weber,* (1979) 443 U.S. 193.

These decisions have been hailed in some quarters as enlightened judicial achievements. It would be more consonant with truth to call them amazing judicial performances. In each of them the Supreme Court committed linguistic mayhem or judicial verbicide on words of the Constitution, or words of an Act of Congress, or on words of both to reach their amazing rulings.

The explanation of these rulings is to be found in a story which may be apocryphal. Representative Timothy J. Campbell, who has been sent to the House by Tammany, sought to persuade President Grover Cleveland to sign into law a pet bill which he had induced Congress to pass. The President demurred on the ground the bill was unconstitutional. Congressman Campbell responded to the President's objection with this rhetorical question: "What's the Constitution between friends?"

When all is said, the Supreme Court did constitutional evil in these rulings to achieve ends it deemed beneficial to blacks and the country. These decisions were not concerned with the assignment of students to state schools. For this reason, I hold my comments on them to a minimum.

To understand the drastic impact of two of them, *South Carolina* v. *Katzenbach*, and *Katzenbach* v. *Morgan*, upon constitutional government in America, it is necessary to understand what the Constitution decrees concerning the power to prescribe qualifications for voting.

The power to prescribe qualifications for voting for state officers is reserved to the state by the Tenth Amendment. The power to prescribe qualifications for voting for federal officers is conferred upon the state and denied to Congress by these provisions of the Constitution: Article I, Section II, Clause 1; Article II, Section I, Clause 2; and the Seventeenth Amendment.

The constitutionality of the highly praised, but completely devious, Voting Rights Act of 1965 was upheld in *South Carolina* v. *Katzenbach*. In reaching that astonishing decision, the Supreme Court was compelled to make and did make these rulings.

a. That the absolute prohibition of congressional bills of attainder embodied in Article I, Section IX, Clause 3, and the due process clause of the Fifth Amendment afford no protection to a state, or its officers, or its citizens in their corporate or collective capacity.

b. That the power of Congress to enforce by appropriate legislation the Fifteenth Amendment's prohibition of racial discrimination in voting confers upon that body the autocratic authority to suspend for at least 5 years the constitutionally guaranteed powers of politically selected Southern States to prescribe qualifications for voting for both state and federal officers.

c. That the constitutional doctrine of the equality of the states is a worthless shibboleth which is effective only at the precise moment of a State's admission to the Union, and does not prevent Congress from robbing a state thereafter of constitutional powers other states exercise and thus reducing it to the status of an inferior state.

d. That Article III, Section II, Clause 2, empowers Congress to close to the politically selected Southern States condemned by the bill of attainder violative of due process all federal courts in the land except the United States District Court for the District of Columbia, and to vest in that far-away court exclusive jurisdiction of all cases in which the condemned states seek relief from the autocratic provisions of the Act.

South Carolina v. *Katzenbach* is irreconcilable with *United States* v. *Lovett*, (1946) 328 U.S. 303, and Ex Parte Milligan, (1866) 4 Wall. (U.S.) 2, 120-121.

The *Lovett* case rightly invalidated a congressional bill of attainder applying to federal executive officers suspected of subversive leanings. The *Milligan* case rightly ruled that the Constitution is an unalterable law for rulers and people alike at all times and under all circumstances, and that no notion involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can ever be suspended.

Consistency may be either a jewel or the hobgoblin of little minds and fools. But it is neither to Supreme Court Justices.

The Supreme Court adjudged in *Kazenbach* v. *Morgan* that the power vested in Congress by Section 5 of the Fourteenth Amendment to enforce the equal protection clause by appropriate legislation confers on Congress the contradictory power to nullify the equal protection clause. In that case, the Supreme Court made a ruling irreconcilable with the provisions of the Constitution governing the power to prescribe qualifications for voting, and its own sound interpretation of equal protection clause in *Lassiter* v. *Board of Education of Northampton County*, (1959) 360 U.S. 35. It declared that Section 5 of the Fourteenth Amendment empowered Congress to do these things:

a. To nullify a New York law which established a qualification for voting, namely, literacy in the English language, which was in harmony with the equal protection clause.

b. To substitute for the nullified New York law a federal qualification for voting, which Congress was forbidden to establish by all of the provisions of the Constitution governing the power to prescribe qualifications for voting.

The opinion which undertakes to rationalize this linguistic mayhem or judicial verbicide is intriguing, despite the disconsolation it gives to those who, like Chief Justice Marshall, believe the Supreme Court ought to interpret the Constitution to mean what it says.

It is simply this: When Congress exercises its power to legislate under Section 5 of the Fourteenth Amendment, the Supreme Court cannot inquire whether the congressional legislation offends the equal protection clause. It is limited to determining whether the legislation is calculated to prevent the state from violating the equal protection clause in the future.

Americans who cherish local government ought to pray that Congress will not carry the illogical ruling in *Katzenbach* v. *Morgan* to its logical conclusion. If it did, Congress would prevent all future violations of the equal protection clause by enacting legislation denying states the power to make, enforce, and interpret laws.

The Supreme Court ruled in *United States Steel Workers* v. *Weber* that an employer in an industry covered by Title VII of the Civil Rights Act of 1964 is authorized by it to discriminate in favor of black employees and against more senior white employees, notwithstanding Title VII expressly forbids all racial discrimination in all industries covered by the Title.

Jones v. *Alfred H. Mayer Company* may be described as the bellwether of the decisions cited in subdivisions 3 and 4. It was decided in 1968, and the other decisions merely follow its indefensible lead.

Undoubtedly the decision in the *Mayer* case and the decisions which follow it have committed the most monstrous linguistic mayhem or judicial verbicide on the Constitution and Acts of Congress in the annals of America.

By these forbidden processes, the Supreme Court Justices have arrogated to Congress and themselves virtually unlimited power to punish every individual who refuses to make a contract with or to sell property to another individual anywhere in America if his refusal is motivated by racial discrimination or racial preference. In so doing, they reflect their purpose to eradicate by constitutional and legal perversions racial prejudice and racial preferences from the minds and hearts of Americans.

To confer their newly invented power on Congress and themselves, the Justices revamp the history and objectives of the Thirteenth Amendment and the Civil Rights Act of 1866 (42 U.S.C.

The federal district courts, which are compelled to implement the Supreme Court's perversion of the equal protection clause, have not monopolized forced busing as an integrating tool. On the contrary, some federal officers have employed it on a massive scale.

From time to time, Congress has enacted laws authorizing grants of federal funds to state school boards to aid them in educating public school students, and has entrusted to federal executive agencies, such as HEW and the newly-created Department of Education, the power to administer these grants in conformity with the congressional intent.

Congress enacted Section 601 of Title VI of the Civil Rights Act of 1964 (42 U.S.C. Section 2000d) to prevent discrimination in federal assisted programs, and not to achieve the integration of state schools. In so doing, it acted in harmony with the true meaning and real objective of the equal protection clause. This section provides:

"No person in the United States shall, on account of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

Unfortunately for constitutional government and freedom, federal executive agencies sometimes delegate the power to administer the grants Congress makes for educational purposes to officers employed by them who are, in reality, crusading bureaucrats. A crusading bureaucrat may be defined as a non-elected federal officer who exercises a mile of power for every inch of authority bestowed on him.

All too often the crusading bureaucrats to whom federal executive agencies delegate their power to administer congressional educational grants are, in reality, compulsory integrationists. They pervert the statutory prohibition of racial discrimination by state school boards receiving federal financial assistance into a positive command that all state school boards applying for or receiving such assistance must be racially integrated to the maximum extent feasible or at least in racial proportions pleasing to them.

They make their perversion of the Act of Congress effective by exploiting in alternative ways the financial needs of state school boards. They make grants without delay to school boards which willingly yield to their integrating objective

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Sections 1981, 1982); place upon that Amendment and that Act constructions totally repugnant to every word in them; and repudiate sound Supreme Court decisions of the past which span a period of 100 years and demonstrate the invalidity of the new construction.

It is worthy of note that some of the litigants argued for the same distorted construction of the Constitution in the Civil Rights Cases of 1883. The Supreme Court wisely rejected their argument by observing that these ligigants were "running the slavery argument into the ground."

The Supreme Court further declared in those cases: "When a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights, as a citizen or a man, are to be protected in the ordinary modes by which other men's rights are protected." (109 U.S. 3, 27 L.Ed. 835, 844.)

One of America's most profound constitutional scholars, Charles Fairman makes some cogent comments on the *Mayer* case in his illuminating book "Reconstruction And Reunion 1864–88, Part I." This book is Volume VI of the History of the Supreme Court of the United States, which is being financed by Oliver Wendell Holmes Devise.

Fairman states that in the *Mayer* case, the Supreme Court "appears to have had no feelings for the truth of history" and "allowed itself to believe impossible things." (p. 1258).

To illustrate what "believing impossible things" is, Fairman invokes Chapter 5 of "Through the Looking Glass" by Lewis Carroll, the creator of Alice in Wonderland, and recounts the colloquy which occurs between Alice and the Queen after the Queen had been telling Alice how to remember "things that happened the week after next."

"I can't believe it," said Alice.

"Can't you?" the Queen said with a pitying tone. "Try again: draw a long breath, and shut your eyes."

Alice laughed. "There's no use trying," she said, "one can't believe impossible things."

"I daresay you haven't had much practice," said the Queen. (pp. 1298–1299, footnote 160.)

I cite and quote these observations of Fairman by the permission of The MacMillan Company, which holds the copyright of his book.

Disciples of linguistic mayhem or judicial verbicide glibly assert it proves that the Constitution is a living document. Not so. It proves that the Constitution is dead, and that Americans are being governed by the personal notions of Supreme Court Justices rather than by constitutional precepts.

Nobody denies the good intentions of the Justices. They undoubtedly believe their linguistic mayhems or judicial verbicides are superior to the handiwork of the Founding Fathers.

and withhold or threaten to withhold grants from those which refuse or are reluctant to do so.

THE OBLIGATION OF THE PRESIDENT AND CONGRESS

Federal courts and federal officers are perpetrating these tyrannies on people of all races in all parts of our country where substantial numbers of children of diverse races live. Despite their pretenses to the contrary, they are seeking to compel racial integration, and not to prevent racial discrimination.

The tyrannies have no rightful place in an America which claims to be the land of the free. They are unconstitutional, wasteful, and useless. They ought to be ended. Those victimized by them cannot end them. But the President and Congress can.

The President and the members of Congress are bound by their oaths to support constitutional government and protect freedom. For this reason, they have the positive duty to end these tyrannies.

They ought not to be deterred from doing their duty because these tyrannies have been sanctioned by Supreme Court decisions. On the contrary, this fact should impel them to act without delay to end the tyrannies. They are the only beings on earth who possess the lawful power to do so.

Supreme Court decisions are the handiwork of fallible men. There is nothing sacrosanct in them. Supreme Court decisions merit respect only if they are respectable, and they are not respectable when they flout the true meaning and real objective of the equal protection clause.

The power of the President, acting alone, to end these tyrannies is more limited than that of the Congress. He has undoubted power, however, to end the tyrannies of the officers of the executive branch of the federal government. They are merely assisting him in performing his constitutional duty to take care that the laws of the nation are faithfully executed, and he can stop them from perverting those laws by annexing to them conditions reputnant to the congressional intent.

The power of Congress to end these tyrannies is virtually unlimited. The Founding Fathers knew the tragic truth that some public officials love power and are prone to abuse it, and inserted in the Constitution provisions adequate to prevent such abuse.

Article I, section 1, of the Constitution vests in Congress "all legislative powers" of the federal government. Hence, Congress may enact new laws sufficient to compel officers of the executive branch of the federal government to stop perverting old laws.

The Constitution confers upon the federal judiciary authority to restrain unconstitutional exercise of power by Congress, and upon Congress authority to restrain the unconstitutional exercise of power by the federal judiciary.

This assertion is undoubtedly shocking to some, especially compulsory integrationists, who believes the Federal judiciary to be omnipotent and Congress to be impotent in the area under consideration.

Section 5 of the Fourteenth Amendment authorizes Congress to enforce, by appropriate legislation, the provisions of the equal protection clause, and Article III of the Constitution empowers Congress to regulate the jurisdiction of all federal courts inferior to the Supreme Court and the appellate jurisidction of the Supreme Court itself.[42]

By virtue of these constitutional provisions, Congress had virtually complete power to enact laws specifying how the equal protection clause is to be enforced in accordance with its true meaning and real objective, and defining the jurisdiction of the fedeal courts in a manner requiring them to act accordingly.

By implementing these constitutional provisions in this way, Congress can put a virtual end to the judicial and bureaucratic tyrannies under consideration.

While I was serving in the Senate, I made remarks explaining these constitutional provisions, and introduced a bill which was aptly designed to use them to end these judicial and bureaucractic tyrannies. My remarks and bill are set out in pages 33,033 to 33,041 of the Congressional Record for November 5, 1969. I reintroduced the bill on other occasions with the co-sponsorship of Senator James B. Allen, of Alabama, one of the nation's wisest and most courageous Senators of all time.

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[42] Among the multitude of decisions adjudging that Congress has the power under Article III to define the jurisidction of federal courts inferior to the Supreme Court are these: *Palmore* v. *United States,* (1973) 411 U.S.. 389; *South Carolina* v. *Katzenbach*, (1966) 383 U.S. 301; *Sears, Roebuck & Co.* v. *Mackey,* (1956) 351 U.S. 427; *Lockarty* v. *Phillips*, (1943) 319 U.S. 182; *Plaquemines Tropical Fruit Co.* v. *Henderson,* (1898) 170 U.S. 511; *Ames* v. *Kansas ex rel Johnston,* (1884) 111 U.S. 449; and *Cary* v. *Curtis,* (1845) 3 How. (44 U.S.) 236. Among the many cases holding that Congress has the power under Article III to regulate the appellate jurisdiction of the Supreme Court are these: *United States* v. *Klain,* (1872) 13 Wall. (80 U.S.) 128; *Re Yerger,* (1869) 8 Wall. (75 U.S.) 85; *Ex Parte McCardle,* (1868) 7 Wall. (74 U.S. 506; *Daniels* v. *Chicago R.I.R. Co.,* (1865) 3 Wall. (70 U.S.) 250; *Ex Parte Vallandigham,* (1864) 1 Wall. (68 U.S.) 243; and *Durousseau,* (1810) 6 Cr. (10 U.S.) 307.

In closing, I pray that the President and the Congress will prove their devotion to constitutional government and the freedom of Americans by ending the judicial and bureaucratic tyrannies I have been discussing. They cannot perform a more important task. When all is said, tyranny in a Republic is far more reprehensible than tyranny in a Monarchy.

REPORT ON PROPOSED LEGISLATION TO LIMIT THE AUTHORITY OF THE DEPARTMENT OF JUSTICE TO RECOMMEND BUSING AS A REMEDY IN SCHOOL DESEGREGATION CASES

By the Committee on Civil Rights of the Association of the Bar of the City of New York

INTRODUCTION

In the decades since *Brown* v. *Board of Education,*[1] public officials in every branch of government—legislative, executive, and judicial—have struggled to apply the demands of the Equal Protection Clause of the Fourteenth Amendment to the system of public education in this country. The Supreme Court's central holding in *Brown* is clear; "[R]acial discrimination in public education is unconstitutional. . . . All provisions of federal, state or local law requiring or permitting such discrimination must yield to this principle."[2] The implementation of this principle, however, has not always proven as clear or easy as was its initial articulation. "Nothing in our national experience prior to 1955," acknowledged the Court in 1971, "prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then."[3]

Many American citizens have met the challenge of *Brown* with goodwill, commonsense, and determination to transform for the better the social climate of our time. Much has been done to implement the promise of the Fourteenth Amendment to all Americans that, whatever their race, each would receive due process and the equal protection of the laws. Yet, despite the gains of the last quarter of century, some officials, "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch,"[4] have continued the operation of intentionally segregated school systems. In those instances where "school authorities [have] fail[ed] in their affirmative obligation"[5] to eliminate such segregation, federal courts have been called upon, under the principles announced in *Brown,* to fashion appropriate remedies.

In recognition of the complexity of redressing constitutional wrongs within a wide variety of educational circumstances, the Supreme Court approved a wide range of possible remedies. The Court noted that "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[6] Among the permissible remedies employed by the federal court has been the use of busing to transport school children to various schools within a district for the purpose of remedying past discrimination. (It should be noted, however, that less than three percent of all busing nationwide is for desegregation purposes.[7])

Courts, no less than legislators, are well aware that the busing remedy has been greeted by some local communities without great enthusiasm.[8] Yet as Chief Justice Burger has explained for the Court, "an absolute prohibition against transportation of students assigned on the basis of race . . . [would] hamper the ability of local authorities to effectively remedy constitutional violations."[9] In short, busing, while not a remedy of first resort, is nevertheless sometimes an indispensable remedy for achieving constitutionally required ends. While communities may not always desire or embrace school busing, they must accept its necessity when other legal remedies have proven unavailing. We join in the belief long ago given voice by Chief Justice Marshall: "The government of the United States has been emphatically termed a government of law, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." [10]

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[1] 347 U.S. 483 (1954).

[2] *Brown* v. *Board of Education* (II), 349 U.S. 294, 298 (1955).

[3] *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 13 (1971).

[4] *Green* v. *County School Board,* 391 U.S. 430, 437–38 (1968). The Supreme Court has repeatedely held that "[e]ach instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." *Columbus Board of Education* v. *Penick,* 443 U.S. 449, 459 (1979).

[5] *Swann* v. *Charlotte-Mecklenburg Board of Education, supra* 402 U.S. at 15; *Columbus Board of Eduation* v. *Penick,* 443 U.S. 449, 458–461 (1979); *Dayton Board of Education* v. *Brinkman,* 443 U.S. 526, 538 (1979).

[6] *Swann, supra,* at 15.

[7] The New York Times, Dec. 4, 1980, § 1, at 25, col. 1.

[8] *See, e.g., Columbus Board of Education* v. *Penick,* 443 U.S. 449, 481 (1979) (Powell, J., dissenting); *id.* at 469 (Burger, C. J., concurring in the judgment).

[9] *North Carolina State Board of Education* v. *Swann,* 402 U.S. 43, 46 (1971).

Congress is currently considering the passage of several bills that would, in different ways, attempt to limit the use of busing as a remedy to overcome prior discrimination in the public schools. On June 9, 1981, Congressman Collins introduced an amendment to the Department of Justice appropriations bill for fiscal year 1982. The Collins rider would prohibit the Department of Justice from initiating lawsuits to require court-ordered busing: "No part of any sum authorized to be appropriated by this Act shall be used by the Department of Justice to bring any sort of action to require directly or indirectly the transportation of any student to a school other than the school which is nearest to the student's home, except for a student requiring special education as a result of being mentally or physically handicapped.[11]

After debate, the rider passed by nearly a two-to-one margin.[12]

In the Senate, separate anti-busing riders were offered by Senator Helms [13] and by Senator Johnston.[14] The Helms amendment is similar to the Collins rider passed by the House; The Johnston amendment would go further and remove the authority of the federal courts to order busing as a remedy, even where it would be the most effective remedy for a proven constitutional violation. Consideration of this legislation was delayed by a filibuster by Senator Weicker until September 16, 1981, when the Senate voted 61-36 to end the filibuster, and approved the Johnston amendment as an addition to the Helms bill.[15] The legislation will soon come before the Senate for a vote on the merits.

This Report represents the view of the Committee on Civil Rights of this Association that both the Johnston amendment and the Helms/Collins amendment are gravely flawed efforts at legislation, constitutionally defective as matters of law and profoundly misdirected as legislative policy. Our Report was completed before the Johnston amendment was proposed. Since the Committee on Federal Legislation of the Association has completed a thoughtful report which outlines the constitutional objections to efforts by Congress to limit the jurisdiction of federal courts to hear constitutional claims,[16] this Report will not address the Johnston amendment. It instead will confine its consideration to the issues raised by proposals to limit the remedies available to the Department of Justice in its litigation of school desegregation cases.

I. THE JUSTICE DEPARTMENT AND THE CURRENT STATUS OF BUSING IN SCHOOL DESEGREGATION CASES

Before we begin a specific discussion of the proposed legislation, it may prove useful to recall the way in which the busing remedy is now applied in school desegregation cases and the role the Department of Justice plays in seeking it.

When the Department of Justice brings a school desegregation suit, its purpose is not to require the physical movement of pupils out of their neighborhood schools. Instead the Department acts to effectuate the constitutional and statutory rights of minority children segregated from white students in public schools by intentional acts of state officials.[17] At present, the Justice Department takes part in school desegregation cases pursuant to the authority granted by Congress under Title IV of the Civil Rights Act of 1964.[18] It may sue school districts which practice or carry forward discrimination in the assignment either of students or of teachers. Any such suits must be approved before filing by the Attorney General of the United

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[10] *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 163, (1803).

[11] 127 Congressional Record H2796 (daily ed. June 9, 1981).

[12] 127 Congressional Record H2799-80 (daily ed. June 9, 1981).

[13] 127 Congressional Record S6274 (daily ed. June 16, 1981).

[14] 127 Congressional Record S6644-45 (daily ed. June 22, 1981).

[15] 127 Congressional Record S9718-19, S9727 (daily ed. Sept. 16, 1981).

[16] Report of the Federal Legislation Committee of the Association of the Bar of the City of New York, "Jurisdiction-Stripping Proposals in Congress: The Threat to Judicial Constitutional Review" vol. 36, No. 8 The Record (December 1981).

[17] Under the Fourteenth Amendment and Title IV of the Civil Rights Act of 1964, 42 U.S.C. §2000(c), a plaintiff, including the United States, must prove intentional racial discrimination to prevail. *Washington* v. *Davis,* 426 U.S. 229 (1976).

[18] 42 U.S.C. §2000c-6 (1974).

States, who must certify, inter alia, that efforts to secure voluntary compliance by the allegedly offending school district have failed.[19] Furthermore, Title IX of the Civil Rights Act of 1964[20] authorizes the Attorney General to intervene in privately-initiated litigation against school districts alleged to have intentionally segregated their students. "In such action," concludes Title IX, "the United States shall be entitled to the same relief as if it had instituted the action."

In practice, the Civil Rights Division of the Department of Justice, which is responsible for investigating the complaints of racial segregation in the nation's schools, does not embark on its task haphazardly. Rather, after receiving complaints from parents, other interested citizens, or concerned organizations, the Division has historically requested substantiation of the allegations of discrimination and, if the charges seem substantial, has conducted detailed inquiries into the challenged policies and practices of the accused school district. Thereafter, having completed its investigation and determined that a case of intentional segregation exists, the offending school districts have been given an opportunity for a negotiated settlement. Indeed, even after a district court has found a school system liable for segregative practices, the initial opportunity to create a desegregation remedy is offered to the offending school district.[21]

In this process, the United States often employs experts skilled in judging the probable results of a student desegregation plan and in designing plans with issues of efficiency, cost and practicability in mind. Often, the expert employed by the United States works closely with local officials in evaluating possible approaches to desegregation.[22]

Under current practices, then, busing is not the end pursued by the Justice Department in school litigation; as a remedy, busing is recommended only when, as a practical matter, it is likely to be the sole available means to dismantle a segregated school system. With this background in mind, we now turn to our evaluation of the constitutional problems of the Helms/Collins rider.

II. THE HELMS/COLLINS AMENDMENT

A. The Scope of the Amendment

Although the most serious problems with the Helms/Collins rider identified by the Committee are constitutional in nature, we note preliminarily that the language of the rider is quite ambiguous, and susceptible of at least two inconsistent interpretations. Under one interpretation, the Department of Justice would be permitted to continue bringing lawsuites to redress unconstitutional discrimination, but would be forbidden to advocate busing as a possible remedy. Under an alternative reading of the rider, the Department would not be permitted even to file, much less to participate, in, desegregation suits when it reasonably anticipated that busing would be a necessary remedy.

Although this latter interpretation seems to coincide with the overall aims of several of the rider's sponsors,[23] we find it an implausible reading. As a matter of drafting, had such a broad prohibition been intended, the originators could easily have clarified their intentions by barring participation in all litigation which "might foreseeably require or result in busing orders," or by use of another similar phase. They did not do so. Beyond this drafting point, moreover, the interpretation seems an unlikely one on practical grounds as well. Since busing is a conceivable remedy at the outset of many, if not all, desegregation suits, such an interpretation would eliminate altogether the participation of the Justice Department in most school discrimination cases. Absent express statutory language, we find such a radical interpretation of the rider unwarranted.

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[19] Under Title IV, the Attorney General must certify as well that the Government has received a complaint from a parent or parents who are unable to initiate or sustain a lawsuit against the allegedly discriminating school district.

[20] 42 U.S.C. § 2000h-2 (1974).

[21] *See* 28 C.F.R. § 0.50(b), 0.50(c) (1980); 126 Cong. Rec. S14312-13 (daily ed. Nov. 12, 1980) (letter from Attorney General Benjamin R. Civiletti to Senator Warren G. Magnuson). See also Defendant's Motion to Dismiss in *United States* v. *Charleston County School District,* Civ. No. 81-5334 (D.S.C. 1981) (discussing Department's investigation and negotiations in desegregation case).

[22] See, e.g., *Davis* v. *East Baton Rouge Parish School Bd.*, Civ. No. 1662-A (M.D. La. May 5, 1981).

[23] Senator Helms, for example, remarked that: "[T]he Federal courts have been legislating instead of adjudicating. That is precisely what has happened, and this Senate and House of Representatives are long overdue in putting their respective feet down and saying, 'No more. This is a tripartite system of government. We are the representatives of the people. We have a right, we have a duty, to put an end to the demonstrable folly of forced busing which has been tormenting little children for no purpose whatsoever except to satisfy the whim and caprice of some Federal judge somewhere or some Federal bureaucrat or a whole nest of them in the Justice Department.' 126 Cong. Rec. S15305 (daily ed. Dec. 3, 1980)."

Furthermore, a more limited purpose for the rider appears justified by legislative history. Senator Thurmond for example, explained his understanding of the legislation in these terms: "The current bill does not . . . limit the authority of the Justice Department to investigate and take remedial action against discrimination. It merely limits the remedies which the Department may seek by removing its power to seek mandatory busing. . . . [I]t simply redirects the thrust of the remedies favored and advocated by the Department." [24] On balance, therefore, we believe this limited view of the rider is what is intended.

What is troubling to us, however, is that, while this more limited construction of the rider is probable, some doubts about the clear intent of Congress remain on this point. In an area so fraught with constitutional peril, Congress should take care to avoid passage of legislation the meaning of which is open to such serious question and whose alternative readings are so radically different in their requirements of the Department of Justice.

B. The Helms/Collins Rider Would Violate Separation of Powers Principles

Assuming, as we have, that the Helms/Collins rider is intended to prohibit the Justice Department from seeking busing as a remedy in school desegregation cases, we view as by far the most far-reaching constitutional problem posed by the rider its threat to the principle of separation of powers. "Separation of powers," as Chief Justice Burger has recently cautioned, is in no sense a formalism. It is the characteristic that distinguished our system from all others conceived up to the time of our Constitution. With federalism, separation of powers is "one of the two great structural principles of the American constitutional system. . . ." E. Corwin, The President 9 (1957). See also *Griswold* v. *Connecticut,* 381 U.S. 479, 501 (1965) (Harlan, J., concurring in judgment).[25]

The Chief Justice speaks here out of a clear and consistent tradition extending backward to the *Federalist* papers,[26] to the statements of the Framers themselves,[27] and to the opinions of our greatest jurists.[28] "[A]ll of the courts which have addressed themselves to the matter start on common ground in the recognition of the intent of the Framers that the powers of the three great branches of the National Government be largely separated from one another." [29]

The executive power derives from Article II of the Constitution, which provides that "[t]he executive Power shall be vested in a President of the United States," [30] and imposes upon the Executive the "Care that the Laws be faithfully executed." [31] Separation of powers principles, of course, apply with no less force to conflicts between the legislative and executive branches than to conflicts between the other coordinates branches of government and executive power has been jealously guarded by the courts against legislative encroachment. Where Congress, for example, gave itself appointment power over members of the Federal Election Commission established by the Federal Election Campaign Act of 1971, the Supreme Court in

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[24] 127 Congressional Record S14306 (daily ed. Nov. 12, 1980). A similar understanding was expressed in the House of Representatives by Congressman Dougherty:

"[I]f we can achieve nothing else with this amendment, we are saying in effect, 'Yes, you can prosecute for discrimination, but you are not going to be a party to submitting a plan to a Federal court that says, "You, the Department of Justice, are recommending as a solution to that discrimination that we forcibly bus youngsters here and there and everywhere, across city lines and city limits and across county lines and everything else." '

Justice can prosecute discrimination, and they should. This amendment will not stop Justice from prosecuting. But it will stop Justice from submitting a plan to the Federal court that includes forced busing. It will say to Justice, 'Submit a plan on certain kinds of schools, and whatever you want to do, but you are not going to use busing as a part of the plan.' So we can achieve something, a little bit. We are not going to stop the Federal courts from ordering busing, but we are going to say to Justice, 'You are not going to submit to the Federal courts as a plan against discrimination forced busing.' 126 Cong. Rec. H6374 (daily ed. July 23, 1980).

[25] *Nixon* v. *Administrator of General Services,* 433 U.S. 425, 507 (Burger, C. J., dissenting).

[26] *See, e.g.,* THE FEDERALIST Nos. 47–48 (J. Madison), 299–313 (Lodge ed., 1888).

[27] *See, e.g.,* 1 Messages and Papers of the Presidents 195 (J. Richardson, comp., 1899) (George Washington's rejection of legislative encroachment).

[28] *See., e.g., Myers* v. *United States,* 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting); *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 589 (1952) (Black, J.); *id.,* 610–14 (Frankfurter, J., concurring).

[29] *Buckley* v. *Valeo,* 424 U.S. 1, 120 (1976).

[30] U.S. Constitution art. II, § 1.

[31] U.S. Constitution art. II, § 3.

Buckley v. *Valeo*[32] declared the legislation unconstitutional, holding it a violation of separation of powers principles. The Court based its judgment in part on the legislative infringement on the executive's appointment powers,[33] but, in language directly relevant to the Helms/Collins legislation presently under consideration the Court warned: "The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress that the Constitution entrusts the responsibility to 'take care that the Laws be faithfully executed.'"[34]

Referring to its nineteenth century opinion in the *Confiscation* cases,[35] the Court stated clearly its view on the executive prerogative in "litigation conducted in the courts of the United States": "Whether tested . . . by the requirements of the Judiciary Act, or by the usage of the government, or by the decisions of this court, it is clear that all such suits, so far as the interests of the United States are concerned, are subject to the direction, and within the control of, the Attorney-General."[36]

Viewed in light of these principles, the Helms/Collins rider is surely a gravely misdirected intrusion on executive authority. The rider purports to "control, direct or restrain the action of" the Department of Justice,[37] to subject it "directly or indirectly, to, the coercive influence of" the legislative branch.[38] Congress has chosen to grant to the Justice Department the responsibility under Title IV to bring school desegregation cases; in executing that authority, however, the Department is entitled to determine what the demands of each case may, in good faith, require. *Buckley* v. *Valeo,* as we have seen insisted that "it is to the President, and not to the Congress" that responsibility over the conduct of lawsuits has been entrusted by our Constitution. If this is so, from what source can Congress derive authority to direct or limit the legal remedies sought by the executive in particular lawsuits? We suggest that the Constitution simply does not give Congress such authority.

Because our Committee believes that the Helms/Collins rider would violate separation of powers principles, we believe that, as a matter of policy, its enactment would be extremely unwise. The rider clearly promises a major, divisive constitutional conflict in the federal courts between the legislative and executive branches over a highly charged, emotional public issue. Whether brought by the Department of Justice itself, or by others on its behalf,[39] such a confrontation could do little to promote rational public resolution of school busing problems. If, as we expect, the rider wer ultimately declared to be unconstitutional, its passage would have done no more than to impair respect for Congress and for our constitutional system of government. The current legislative course seems, in short, and imprudent possibly and inflammatory, and ultimately an unavailing measure.

C. The Helms/Collins Rider May Constitute "An Explicitly Racial Classifiation"[40] In Violation of the Equal Protection Component of the Fifth Amendment

The Committee believes that the Helms/Collins rider is drafted so as to inhibit the transportation of students in school desegregation cases only, and not when busing is used for other purposes, and that it, therefore, raises serious constitutional questions under the Supreme Court's decision in *Hunter* v. *Erickson.*[41] *Hunter* concerned an amendment to the city charter of Akron, Ohio which denied legal effect to any city council ordinance dealing with racial, religious or ancestral discrimination in housing until a majority of Akron's voters approved it at a general election. The charter contained no such requirement of voter approval for any other kind of city council action. The Court found that the charter provision in practice "disadvantages those who would benefit from laws barring racial, religious or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor," and thus "place[d] special burdens on racial minorities within the governmental process."[42] Justice Harlan, concurring, found the amendment "discriminatory on its face" because it "has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest."[43] The Court concluded that the statute could not survive strict scrutiny.

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[32] *Buckley* v. *Valeo,* 424 U.S. 1, 124–37 (1975) U.S. Constitution art. II, § 2 provides in part: [The President] shall have Power . . . by and with the Advice and Consent of the Senate . . . [to] appoint . . . all other Officers of the United States whose Appointments are not herein otherwise provided for. . . ."

[33] *Buckley* v. *Valeo,* supra, 424 U.S. at 124–37.

[34] *Id. at 138.*

[35] 74 U.S. (7 Wall.) 454, 458–59 (1869).

[36] *Buckley* v. *Valeo, supra,* 424 U.S. at 139. See also *Myers* v. *United States,* 272 U.S. 52 (1926); *Springer* v. *Philippine Islands,* 277 U.S. 189 (1928). The Ninth Circuit, in a comprehensive recent opinion on separation of powers principles, expressed the view that "all would agree" that "an attempt by Congress to exercise the prosecutorial and adjudicative responsibilities of enforcing the criminal law" would "violate the Constitution." *Chadha* v. *INS,* 634 F.2d 408, 424 (9th Cir.), *cert. granted sub nom. INS* v. *Chadha, et al.* U.S. , 50 U.S.L.W. 3211 (U.S., Oct. 6, 1981) (Nos. 80–1832; 80–2170; 80–2171).

[37] *Massachusetts* v. *Mellon,* 262 U.S. 447, 488 (1923).

[38] *O'Donoghue* v. *United States,* 289 U.S. 516, 530 (1933).

[39] Even if the current Department of Justice were reluctant to test the constitutionality of the Helms/Collins legislation in court, it is likely that private litigants would bring suit seeking a declaration of the Department's obligations under the statute. See generally *Brown* v. *Califano,* 627 F.2d 1221 (D.C. Cir. 1980); *Adams* v. *Richardson,* 351 F. Supp. 636 (D.D.C. 1972), modified, 356 F. Supp. 92 (D.D.C.), aff'd., 480 F.2d 1159 (D.C. Cir. 1973) (en banc).

[40] *Hunter* v. *Erickson,* 393 U.S. 385, 389 (1969).

[41] *Id.*

In *Lee* v. *Nyquist*,[44] a New York statute prohibited state education officials or appointed boards of education from establishing any school or school district for the purpose of achieving equality in attendance of persons of one or more particular races, creeds, colors or national origin, or from requiring involuntary assignment of pupils for the purpose of achieving racial balance unless such action by an administrative or appointed official were approved by an elected school board. The statute did not require approval by an elected school board for administrative action intended to achieve other goals. That portion of the statute in *Lee* v. *Nyquist* dealing with the involuntary transportation of students to achieve racial balance is somewhat similar to the Helms/Collins rider. Second Circuit Judge Hays, writing for a three-judge court, applied the Supreme Court's reasoning in *Hunter* to strike down the statute, concluding that it "thus creates a clearly racial classification, treating education matters involving racial criteria differently from other education matters and making it more difficult to deal with racial imbalance in the public schools."[45] The Supreme court, in apparent approval of this application of *Hunter*, summarily affirmed. Similarly, a state anti-busing statute which prohibited the assignment of students other than the one nearest their homes for racial purposes, but permitted such assignments for non-racial purposes, was recently invalidated by the Ninth Circuit on the basis of *Hunter*, in *Seattle School District No. 1* v. *State*.[46] The Supreme Court has noted probable jurisdiction in the *Seattle* case. However, *Hunter* v. *Erickson* was cited with approval by the Court as recently as 1976 when it spelled out the appropriate standards for determining intentional discrimination.[47]

We believe that the reasoning of the Court and Justice Harlan in *Hunter* v. *Erickson* and the summary affirmance by the Court in *Nyquist* suggest that the Helms/Collins rider could well be viewed by courts as "discriminatory on its face." It is drafted to apply only to cases brought to remedy unconstitutional racial discrimination. Because the rider limits the ability of the Justice Department to seek student busing when it may be the only effective way to combat discrimination, it thereby hampers the representation by the Department of discrimination victims, and thus places "special burdens on racial minorities." Such classifications have been found constitutionally suspect and are required to undergo strict judicial scrutiny. We believe it would be most unwise for Congress to enact legislation so similar to that which the Supreme Court has previously held to deny the guarantees of equal protection of the laws.

D. The Helms/Collins Rider Would Interfere With the Federal Government's Duty Not to Support Segregated Schools, and Presents Grave Constitutional Difficulties

The Supreme Court declared in *Cooper* v. *Aaron*[48] that governmental support for intentionally segregated schools violates a basic constitutional command: "State support for segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law. *Bolling* v. *Sharpe*, 347 U.S. 497."[49]

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[42] *Id.* at 391.

[43] *Id.* at 395 (Harlan, J., joined by Steward, J., concurring).

[44] 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd., 402 U.S. 935 (1971).

[45] 318 F. Supp. at 719.

[46] 633 F. 2d 1338 (9th Cir. 1980), *aff'g.*, 473 F. Supp. 996 (W.D. Wash. 1979). Probable jurisdiction was noted by the Supreme Court on October 6, 1981. U.S. , 50 U.S.L.W. 3278 (Oct. 13, 1981) (No. 81-9).

[47] *Washington* v. *Davis*, 426 U.S. 229, 241 (1976).

[48] 358 U.S. 1 (1958).

[49] *Id.* at 19.

The command of *Cooper* is as binding on the federal government as on the States,[50] and it has been codified in Title VI of the Civil Rights Act of 1964 with respect to "any program or activity receiving federal financial assistance.[51]

Under Title VI, federal administrative agencies charged with the distribution of funds are given an enforcement role in school desegregation under the coordination of the Justice Department.[52] In particular, the Department of Health, Education and Welfare and its successor Department of Education have been required to monitor the compliance of local school districts with the law and to withhold federal funds where they find that the law is being violated.[53]

Yet through a series of amendments by Congress, the power of these federal agencies to order student transportation as a remedy where districts have been found to maintain segregated public schools has been curtailed.[54] The language of these congressional provisions has been similar to the rider at issue here. The latest provision, the Eagleton-Biden Amendment, provides, in pertinent part, that federal funds shall not be use "to require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home, except for a student requiring special education, to the school offering such special education, in order to comply with Title VI of the Civil Rights Act of 1964."[55]

The Eagleton-Biden Amendment and related amendments were challenged in federal court in *Brown* v. *Califano*[56] on several grounds: (i) that the amendments had a discriminatory purpose, because their supporters intended them as part of a broadbased assault on busing as a remedy for segregated schools; (ii) that the legislation prevented the executive branch from enforcing the Constitution and federal statutes prohibiting discrimination in violation of the separation of powers doctrine; and (iii) that the amendments stripped the executive branch of its most effective method of dealing with segregated schools, thus forcing the executive branch to support segregated schools in violation of *Cooper* v. *Aaron*.

The Court of Appeals for the District of Columbia rejected this challenge. In so doing, however, the Court of Appeals expressly relied on statements in Congress that the intent of the amendments was to channel enforcement efforts to the Justice Department and thus to avoid cumbersome administrative enforcement procedures. Should the Justice Department prove unable or unwilling to enforce the law, the court stated, these amendments might well be found to be unconstitutional as applied.[57] The court instead assumed, in order to avoid grave constitutional doubts, that the Department of Justice would act speedily to enforce the Constitution and the law in cases where federal funds were being distributed to local school districts which maintained invidiously segregated school systems: "[T]he Department is under strict obligation to avoid delay. To avoid constitutional doubts, we must proceed on the assumption that Congress intended the Department of Justice to act with the greatest dispatch. Otherwise the amendments may be seen as a tool of delay to avoid dismantling unconstitutionally segregated school systems."[58]

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[50] *Bolling* v. *Sharpe*, 347 U.S. 497 (1954) (Washington, D.C. school desegregation case).

[51] Title VI, 42 U.S.C. § 2000d provides that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

[52] Executive Order No. 12250, 45 C.F.R. 72995 (1980).

[53] 45 C.F.R. Part 80 (1979); See *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973).

[54] The Esch Amendment, 20 U.S.C. § 1714(a), enacted in 1974, provides that "No court, department, or agency of the United States shall, pursuant to section 1713 of this title . . . order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student."

The effect of the Esch Amendment was modified by a provision in the same legislation that "the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States." 20 U.S.C. § 1702(b). The Byrd Amendment, Public Law 94-206, § 209, 90 Stat. 22, re-enacted as Public Law 94-439, § 108, 90 Stat. 1434, which is a rider to the 1976 Labor-HEW Appropriations Act, provided that: "None of the funds contained in this Act shall be used to require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home, and which offers the courses of study pursued by such student, in order to comply with Title VI of the Civil Rights Act of 1964."

[55] The Eagleton-Biden Amendment, Public Law 95-205, 91 Stat. 1460, enacted in 1977, provided that: "None of the funds contained in this Act shall be used to require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home, except for a student requiring special education, to the school offering such special education, in order to comply with title VI of the Civil Rights Act of 1964. For the purpose of this section an indirect requirement of transportation of students includes the transportation of students to carry out a plan involving the reorganization of the grade structure of schools, the pairing of schools, or the clustering of schools, or any combination of grade restructuring, pairing or clustering. The prohibition described in this section does not include the establishment of magnet schools."

[56] 627 F.2d 1221 (D.C. Cir. 1980).

[57] *Id.* at 1230-37.

Hence the decision in *Brown* v. *Califano* conditionally upholding the Eagleton-Biden and other amendments was specifically premised on the Justice Department's power to take effective action against segregated schools, and to seek busing remedies where appropriate.

The Helms/Collins rider appears to have the effect of closing off that option. If the Justice Department cannot seek busing as a remedy in desegregation cases, under the rider, the Department of Education could not rely on the Department of Justice for enforcement when busing is the only constitutionally adequate remedy. The federal government would then be confronted with the prospect of giving further aid to segregated schools, which would be unconstitutional under *Cooper*, or with seeking impoundment of school funds by the President. In the face of this dilemma, it is plain that the Helms/Collins rider could well impair the constitutional duty of the federal government not to support school segregation.

CONCLUSION

Our Committee concludes that the Helms/Collins rider, if enacted, would violate fundamental principles of the separation of powers and would run a grave risk of placing the federal government itself in violation of the equal protection requirements of the Fifth Amendment as well. Moreover, enactment of the rider could force federal court reassessment of the constitutionality of the Eagle-Biden amendments, deferred by the Court of Appeals in *Brown* v. *Califano* on the express assumption that the enforcement authority of the Department of Justice in school desegregation cases would continue unimpaired.

Beyond these legal and constitutional judgments, our Committee opposes the enactment of this legally suspect legislation on prudential and policy grounds. It would, we believe, approach irresponsible lawmaking for Congress to enact legislation so fraught with constitutional infirmity. Also, those supporters of the legislation who are distressed by a perceived intrusion of federal courts into matters deemed more properly the responsibility of other branches of government, will have chosen a peculiarly inappropriate response. If they were to pass this legislation, it seems almost certain to provoke greater involvement of the federal courts because immediate and intense constitutional examination would result.

For all of these reasons, the Committee on Civil Rights respectfully urges Congress to reject the Helms/Collins rider.

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[58] *Id.* ~~at 1233~~.

SOCIAL SCIENCE TESTIMONY IN THE DESEGREGATION CASES — A REPLY TO PROFESSOR KENNETH CLARK

ERNEST VAN DEN HAAG†

EDMOND CAHN[1] and I[2] criticized Professor Kenneth Clark's experiments which, according to his testimony (presented in various stages of litigations decided by the Supreme Court[3]) prove that segregation damages the personalities of Negro children. In his answer,[4] Professor Clark argues lengthily for admission in legal proceedings of competent testimony by social scientists. This is quite beside the point. I objected only to misleading testimony, specifically, his. So did Edmond Cahn, to wit: "we ought no longer to debate the general admissibility of testimony from authentic social science sources . . . we ought to welcome and encourage evidence of this kind."[5]

Since Cahn favors the Supreme Court's decision in *Brown v. Board of Educ.*[6] he was anxious to find out whether it rested on Professor Clark's testimony and thus possibly was vitiated by it. He was relieved to find that it did not. I concur with this finding, on the whole, though no one will ever know to what extent the Court's common sense view that Negroes are humiliated and frustrated by segregation was reinforced by Professor Clark's pseudo-scientific "proof". Probably Professor Clark has done but negligible damage to the Negro cause and to the integrity of our judicial processes. But I remain disturbed about the disrepute his "evidence" could not fail to bring to social science if it were taken seriously. And it seems to be.[7]

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[1] Cahn, *Jurisprudence*, 30 N.Y.U.L. REV. 150 (1955).

[2] ROSS & VAN DEN HAAG, THE FABRIC OF SOCIETY 163-66 (1957).

[3] Bolling v. Sharpe, 347 U.S. 497 (1954); Brown v. Board of Ed., 347 U.S. 483 (1954).

[4] Clark, *The Desegregation Cases: Criticism of the Social Scientist's Role*, 5 VILL. L. REV. 224 (1960).

[5] Cahn, *Jurisprudence*. 31 N.Y.U.L. REV. 182, 192 (1956). Cahn's essay contains a broad and stimulating discussion of the desirability of "authentic" and the undesirability of incompetent testimony by social scientists. It completes and elaborates criteria implicit in the article cited in note 1 *supra* and applies them to the testimony of Professor Isador Chein in the *Girard Trust* case. See Transcript of Record, pp. 574-76, Girard Trust, 5 Pa. Fiduc. Rep. 449 (Orphans' Ct., Phila. 1955). Professor Chein, unlike Professor Clark, did not attempt to prove his views experimentally. Rather he suggested that an opinion, if it comes from him, is *ipso facto* scientific. To this *differentia* Cahn addresses himself.

[6] 347 U.S. 483 (1954).

[7] See *e.g.*, Appendix to appellants' brief in Brown v. Board of Education.

Unlike Edmond Cahn, I am doubtful, as well, about the wisdom of the decision in the desegregation cases. Though more vague and less crude, the Court's reasoning strikes me as having something in common with Professor Clark's conclusions even though not relying on his evidence. I shall try first to indicate once more my doubts about the decision and then to clarify the difference between social science and Professor Clark's doings.

INTENDED AND ACTUAL EFFECTS OF *Brown v. Board of Educ.*

The Court's intention in the *Brown* case was to end the humiliation and the attendant psychological damage to Negro children found to inhere in segregation. Will the means the Court has chosen accomplish this end? Will the prejudice which inflicts humiliation on Negroes be disminished? Events seem to have confirmed my original guess that the Court's action will turn out to be a very mixed blessing.

It is often assumed that prejudice springs from ignorance and is reduced by knowledge and contact. This is certainly the case if the prejudice has no source but misinformation. Yet, misinformation often is the effect and not the cause of prejudice which itself springs from a variety of social and psychological sources. Information, or contact, is no cure where misinformation is the effect and not the cause of prejudice. The slaughter of the Jews in Germany was not due to ignorance or preceded by segregation or avoided by contact. In times past, hundreds of thousands of harmless old women were burned as witches. The people who accused them of being witches, who saw them riding through the air, etc., were their neighbors, villagers who had known them long and well. Clearly, contact produces as much as it reduces prejudice. And divorce cases suggest that even prolonged and intimate contact can produce hostility, contempt and prejudice just as well as affection, respect and knowledge.

Much depends upon the conditions in which the contact takes place. Now, the imposition of congregation by the Court in Washington will hardly make the local white children compelled to go to school with Negro children (or their families which influence them) receptive to the ideals to be fostered; nor will the circumstances help them perceive the actual individual Negro as distinguished from the stereotype, or generate the open mind and the warmth the new schoolmates want. One need not be a psychologist to see that many, even of the previously indifferent or well-disposed, are likely to turn against the

Negroes: Southern resentment of the imposition is likely to be shifted to those supposed to benefit from it. Is it less damaging for the Negro children to go to school together with resentful whites than separately? I cannot imagine that being resented and shunned personally and concretely by their white schoolmates throughout every day would be less humiliating to Negro children than a general abstract knowledge that they are separately educated because of white prejudice. Curiously, social scientists, with rare exceptions, are not very interested in investigating the effects on Negro children of going to school with hostile whites. Desegregated education is supposed to work almost magically — hence no need to investigate actual effects.[8]

The Court's view that "segregation with the sanction of the law" is humiliating is doubtlessly true under the historical circumstances. But the implication that such segregation is *more* humiliating than segregation by legal compulsion is a *non sequitur;* yet no independent evidence or argument supporting it was offered. Since the Court's stated purpose was to extend constitutional protection against humiliation and its presumed effects, it seems to me that the Court should have asked itself whether — given its duty to extend such protection — it was effectively doing so. As it is, quite possibly the Court prescribed a *medicinam pejor morbus,* intensifying the humiliation it meant to eliminate.

DOES THE CONSTITUTION REQUIRE COMPULSORY CONGREGATION?

The constitutional duty shouldered by the Court to protect against presumed psychological damage arising from humiliation inflicted by legally sanctioned separation raises additional questions. Suppose it were shown that white children feel humiliated by legally sanctioned congregation and that their suffering tends to impair their personality. If the Court did not feel that their constitutional rights were violated, a distinction between constitutionally permissible and impermissible humiliation (and personality damage) must have been made. How? In terms of intent? Or is humiliation by disjunction always wrong and by junction never? The Court's present decision does not shed much light on the question; it does not, therefore, avoid the impression that the Constitution makes togetherness compulsory in public institutions if one of the parties feels disturbed by segregation.

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[8] Similarly, at times social scientists simply have assumed damage by segregation to all concerned — Negroes or whites — on the basis of nothing more than their own prejudices. See Cahn, *supra* note 5. Exceptions by a number of social scientists are in the appendix to appellants' brief in Brown v. Board of Ed. Their effort was more well-intentioned than scientific; *inter alia*, it does take Professor Clark's "evidence" quite seriously. In view of the high scientific standing of many of the signers it is likely that they were not actually familiar with this "evidence." The analysis below will suggest why this is the most charitable interpretation — it scarcely increases one's confidence.

It is mainly the compulsory feature that makes me uneasy. Professor Clark writes:[9] "nowhere does the Court demand what Dr. van den Haag calls 'compulsory congregation.' And certainly the Court does not attempt 'to compel equal esteem of groups for each other.'" He concludes that I "did not read or did not understand" the decision. This allegation seems inspired by the following passage.[10]

> "The Supreme Court's decision did not deny that segregated facilities, equally good in all material respects, might be offered to all groups. But material equality, the Justices now hold, is not enough. The equal protection clause of the Fourteenth Amendment and the due process clause of the Fifth Amendment are found violated whenever, by means of segregating the members of a group in public facilities, the government intends to impose (or maintain) an inferior status for the group. The Court had little doubt that this was the intent or that the segregated Negroes felt slighted and were thus hurt.
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> "Had the Court outlawed only the compulsory segregation of groups legislated by many Southern states, it would have extended freedom of association hitherto denied those Southerners of both races who wanted their children in mixed public schools. But the 1954 doctrine goes beyond prohibiting *compulsory segregation* to replace it with *compulsory congregation*. The Court, to increase freedom of association, curtailed freedom of dissociation. The Fourteenth Amendment was interpreted to mean that no group has the right to be separated from another on public property when the other's pride is hurt thereby.
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> "If the pride of one group is hurt by compulsory segregation, the pride of the other might be hurt by compulsory congregation. The pride of the group resisting congregation, the Court must have felt, is arrogant and snobbish and rests on a feeling of superiority undeserving of public protection. Whereas Negroes were found deserving of protection when they resist being stigmatized as inferior, injured in their pride, by segregation. Thus, not only are people equal before the law; the law now actively prevents one group from stamping another as inferior by refusing to open public facilities to common use.
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> "The Court's decision has the defects of its virtues: it attempts to compel equal esteem of groups for each other. This attempt narrows, as well as enlarges, the right we each have to associate with whoever consents to associate with us and to dis-

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[9] Clark, *supra* note 5 at 237.
[10] ROSS & VAN DEN HAAG, *op. cit. supra* note 2 at 163.

> sociate from whomever we do not care to associate with. Of course people can still send their children to private segregated schools. But this makes segregation a privilege of the rich. The snob value of segregation will be increased thus, as well as the resentment of the Southern 'poor whites,' who must use the public schools and are already a highly prejudiced group. Time will tell whether the Court overshot its mark — whether its generosity exceeded its wisdom."

I believe that it is fair to say that segregation is compulsory if imposed by law regardless of the wishes of at least one of the segregated groups; and, *eo ipso,* that congregation is compulsory if imposed by law regardless of the wishes of at least one of the groups concerned. Further, the purpose of the Court in decreeing compulsory congregation was to end a situation which (in the language of the lower courts cited with approval by Chief Justice Warren) denotes "the inferiority of the Negro group." I think it is fair and reasonable then to interpret the Court's mandate as compelling congregation in the hope of compelling "equal esteem" of the groups for each other. After all, the Court, though vague, did not suggest that congregation is a good per se; or segregation bad per se; it found segregation "inherently unequal" because of its humiliating connotations which congregation was to avoid. An alternative reading is possible, but would lead to very odd conclusions and deprive the decision of the rationale it is generally conceded to have. Hence, my opinion remains that, though the end be laudable, the means do not suit it; that compulsory congregation is objectionable and not the proper remedy for the at least equally objectionable compulsory segregation its replaces. The Court would have been on better grounds legally, morally and in terms of prospective effects had it outlawed compulsory segregation without replacing it with compulsory congregation.[11]

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[11] van den Haag, Education as an Industry appendix B (1956): "People have a right to be prejudiced and intolerant, although one has a right to persuade them to truth and tolerance, and educators have a duty to do so. But no one has a right to *impose* his prejudice and to injure others through his intolerance. Laws permitting segregation must be distinguished from laws making segregation (or non-segregation) compulsory. The former increase, while the latter decrease freedom.

"There should be schools for whites, schools for Negroes, and schools which both can attend, just as there are colleges for males, females, and coeducational ones. As any man or woman may choose a college restricted to his (or her) own sex, or one attended by both, so any white or Negro should be able to choose freely a school attended by those of his own group alone, or one where attendance by both groups is permitted. Neither the legal enforcement of segregation or compulsory congregation — the outlawing of segregation — are consistent with freedom. No Negro (or white) ought to be compelled to attend an exclusive Negro (or white) school, but any Negro (or white) ought to be allowed, if he wants to. Whether the school chosen by the student (or the school which has elected to accept him) is 'white',

ILLITERACIES, IRRELEVANCIES AND INACCURACIES

Professor Clark is sure that an analysis which comes to conclusions differing from his own cannot be based on "direct knowledge of the facts" and is due to failure to "read" or "understand" the relevant material. This accusation is levelled against me whenever I differ from Professor Clark, be it only in phrasing. Nor am I the only victim. Thus, Edmond Cahn wrote:[12]

> "Moreover, if affronts are repeated often enough, they may ultimately injure the victim's backbone. We hear there are American Negroes who protest they do not feel insulted by racially segregated public schools. If there are any such Negroes, then they are the ones who have been injured most grievously of all, because segregation has shattered their spines and deprived them of self-respect."

Professor Clark comments as follows:[13] ". . . The 'shattering of spines' is Professor Cahn's contribution to the knowledge of the detrimental effects of racial segregation. No social scientist testified to this 'fact'." This comment has the merit of throwing into bold

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'mixed', or 'black', it should afford educational opportunity equal to that of the school forsaken for 'racial' reasons.

"Should Negroes (or whites) not elect to attend schools restricted to their 'race,' these schools would disappear and only mixed ones would survive. But that would happen only as prejudices are overcome, not as a result of legal compulsion. Neither Negroes nor whites should be compelled to associate with each other, but both should be free to. This implies that either group may on occasion reject association with the other. It is true that if one wants to associates with someone and is rejected, it hurts. But would it hurt less to be tolerated by legal compulsion? To this possible pain we all must adjust ourselves throughout our adult life — and if segregation at times seems silly, the demand for compulsory nonsegregation is more silly. The right to freely associate with, or disassociate from, each other is a basic constituent of freedom even if the use made of this right is at times snobbish, silly or misinformed. Should schools which exclude whites (or Negroes) survive, they will do no more harm than the survival of Smith or Amherst — although we must admit that the reasons for the segregation of races are even less logical than those for segregation of sexes.

"Many believe that although the foregoing argument is correct, putting it in practice would be too expensive for the communities likely to want separate schools in addition to mixed ones which would become obligatory if separate facilities are provided. The mixed schools would accommodate the group which does not wish to be deprived of association with 'races' other than its own. It is true that the triplication of facilities (which is not always required; the same facilities may be used separately at times) involves considerable extra expense. But in a democracy, a community has the right to decide whether it wants less education *per capita* and lower taxes, or more education and higher taxes, and also whether it wants less good (but equal) facilities, for the sake of the desired separation; just as it has the right to decide on more beer and less education if it wishes. We may try to persuade people not to take that decision; but we may not compel them."

Events have convinced me that the Court's decision is not likely to achieve more actual congregation than my proposals would have. Possibly less. And having caused much resistance, the decision might well delay even this result and in the process intensify hostilities all around.

[12] Cahn, *supra* note 1 at 158-59.

[13] Clark, *supra* note 4 at 232.

relief Professor Clark's reading comprehension of straight-forward prose, including a simple metaphor. Otherwise its relevance eludes me. Indeed, much of Professor Clark's paper altogether leaves me baffled. He is curiously insistent throughout on matters the relevance of which is asseverated, but never explained. Thus:[14] "Dr. van den Haag betrays himself by repeating a crucial error which was first found in Professor Cahn's criticism of the role of social scientists in these cases. He repeats Cahn's error that 'Professor Clark presented *drawings* of dolls to the children.' "

Now, if that be an error, wherein it would be "crucial" or at least important or relevant we are not told. No argument whatever was based on the difference between "dolls" and "drawings of dolls." But, worse, the "crucial error" is no error at all. Edmond Cahn[15] quotes Professor Clark's sworn testimony in the South Carolina case: ". . . I used these methods which I told you about — the Negro and white dolls —. . . . And, I presented them with a sheet of paper on which there were these drawing of dolls, and I asked them to show me the doll. . . ." In short, Professor Clark in his testimony used "dolls" and "drawings of dolls" interchangeably. Cahn's inference that in the Sourth Carolina case, drawings were involved seems entirely proper and I followed it, only to be accused of "crucial error"! Yet none of my arguments would be changed if "drawing" were replaced with "dolls." I mentioned previous experiments by Professor Clark,[16] and there I referred to "the rejection of colored dolls by Negro children." Thus, I never committed the "crucial error" of which Professor Clark accuses me and which is neither crucial nor error; and Edmond Cahn's "crucial error" consisted in his having quoted Professor Clark. All this is certainly odd. Professor Clark's complaint that I failed to note his previous doll study[17] is odder still: I cited it on the very page from which he quotes me.[18]

PROFESSOR CLARK ACTUALLY "PROVED" THAT SEGREGATION MAKES NO DIFFERENCE

Professor Clark is right, however, in insisting that his trial testimony be viewed more explicitly in the light of his earlier study. Let me first briefly summarize the trial testimony. Referring to experiments performed at the request of counsel in the South Carolina case (testimony in the Delaware and Virginia litigations did not substantially differ), Professor Clark explained that he had shown Negro and white dolls (or drawings) to Negro children in a segregated public school and, having ascertained that they distinguished white from Negro people, asked them, in effect, which doll they preferred, and which one "looks like you." Ten (later in the testimony, nine) out of sixteen Negro children picked the white doll as the nice one, the one they "liked best"; seven picked the white doll as the one that "looked like you." Professor Clark concluded that "these children . . . have been definitely harmed in the development of their personalities."[19] He knew, of course, that the question before the Court was whether school segregation had harmed the children and testified: "my opinion is that a fundamental effect of segregation is basic confusion in the individuals and their concepts about themselves conflicting in their self images. That seemed to be supported by the results of these sixteen children. . . ."[20] The syntax is obscure, but the sense is not. Professor Clark testified (1) that segregation caused the harm he found (or at least played a "fundamental" role); (2) later on that this is "consistent with previous results which we have obtained in testing over 300 children"; (3) finally, "and this result was confirmed in Clarendon County." Elsewhere Professor Clark asseverated: "Proof that state imposed segregation inflicts injuries upon the Negro had to come from the social psychologists. . . ."[21]

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[14] Clark, *supra* note 4 at 237.
[15] Cahn, *supra* note 1 at 162.
[16] Ross & VAN DEN HAAG, *op. cit. supra* note 2 at 165.
[17] Clark, *supra* note 4 at 239.
[18] Ross & VAN DEN HAAG, *op. cit. supra* note 2 at 165 n.35.

Now to Professor Clark's previous results referred to above. 134 Negro children in segregated schools in Arkansas and 119 Negro children in unsegregated nursery and public schools in Springfield, Massachusetts, about evenly divided by sex, were involved.[22] Negro and white dolls were presented, and the children were asked to indicate the "nice" and the "bad" one, as well as the one "that looks like you." Professor Clark concluded that ". . . the children in the northern mixed-school situation do not differ from children in the southern segregated schools in either their knowledge of racial differences or their racial indentification"[23] except that ". . . the southern children in segregated schools are less pronounced in their preference for the white doll, compared to the northern [unsegregated] children's definite preference for this doll. Although still in a minority, a higher percentage of southern children, compared to northern, prefer to play with the colored doll or think that it is a 'nice' doll."[24] The tables presented by Professor Clark bear out his conclusions. Table 4,[25] moreover, shows that a higher percentage of Negro children when asked "give me the doll that looks like you" gave the white doll in the nonsegregated schools — 39 percent as opposed to 29 percent in the segregated schools.

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[19] Quoted in Cahn, *supra* note 1 at 162.

[20] *Ibid.*

[21] Cahn, *supra* note 1 at 159-60.

[22] The children ranged from 3 to 7 years in age; these tested in Clarendon County were between 6 to 9 years old. Professor Clark does not seem to think that the difference in average age affects the results and I have no reason for disagreeing. But, both in view of the difference in average age, and the small size of the Clarendon group, I follow Professor Clark in comparing the two groups described in his previous tests with each other, rather than with the Clarendon group. Since it is possible after all that the effects of segregation vary with age, particularly with length of schooling, competent studies should take this into account. With an older group, Professor Clark's results might have been different; but I do not presume to know.

[23] Clark, *Racial Identification and Preference in Negro Children*, READINGS IN SOCIAL PSYCHOLOGY 174-75 (1947). (Newcomb & Hartley eds. 1947).

I am forced to the conclusion that Professor Clark misled the courts. Whether it be granted that his tests show psychological damage to Negro children, the comparison between the responses of Negro children in segregated and in nonsegregated schools shows that "they do not differ" except that *Negro children in segregated schools "are less pronounced in their preference for the white doll" and more often think of the colored dolls as "nice" or identify with them.* In short, if Professor Clark's tests do demonstrate damage to Negro children, then they demonstrate that the damage is *less* with segregation and *greater* with congregation. Yet, Professor Clark told the Court that he was proving that "segregation inflicts injuries upon the Negro" by the very tests which, if they prove anything — which is doubtful — prove the opposite!

I suspect the NAACP lawyers did not know, and were not told, that the only thing Professor Clark has proved is that, if there is damage, it is not due to school segregation. Else how could they present as an expert witness to demonstrate the damages of school segregation a man who has actually demonstrated only the damages of desegregation? Did Professor Clark know that his own previous tests indicate that according to his own criteria Negro children are less damaged by segregation than by congregation? That, in short, the conclusions he testified to were inconsistent with his own "previous results," although he testified that they were "consistent"? If he did, he deceived the Court deliberately. Perhaps Professor Clark did not remember; perhaps he did not understand. His comments noted above on the "shattering of spines" and the "crucial error" lend support to this hypothesis. If we accept it, we can maintain our confidence in the *bona fides* of the witness. But our confidence in the value of his testimony would be shattered altogether.

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[24] Clark, *supra* note 23 at 177.

[25] Clark, *supra* note 23 at 174.

DID THE TESTS PROVE ANY INJURY?

There remains the question whether Professor Clark has demonstrated any personality damage — which could be caused by general prejudice in the community or by circumstances not affecting Negroes specifically. Professor Clark is confusing on the sources of damage, though he insists that segregation is "fundamental." Tests on white children, or on Jewish and Christian children, were not presented. Such tests would be needed to indicate whether the damage was general (there may be a general confusion of self images in our culture, a "crisis of identity") or restricted to minorities; or restricted to Negro children. That the damage is not restricted to segregated Negro children Professor Clark proved, if he proved anything, but did not tell the Court. But Professor Clark's evidence does not prove even that there is damage. For no proof whatever was presented to indicate that preference for, or identification with, a doll different in color from oneself indicates personality disturbance. I wrote on this point:[26]

> "Suppose dark-haired white children were to identify blonde dolls as nice; or suppose, having the choice, they identified teddy bears as nice rather than any dolls. Would this prove injury owing to (nonexistent) segregation from blondes? or communal prejudice against humans? Professor Clark's logic suggests that it would.
>
> "Control tests — which unfortunately were not presented — might have established an alternative explanation for the identification of white with nice, and black with bad: in our own culture and in many others, including cultures where colored people are practically unknown and cultures were white people are unknown, black has traditionally been the color of evil, death, sorrow, and fear. People are called blackguards or black-hearted when considered evil; and children fear darkness. In these same cultures, white is the color of happiness, joy, and innocence. We need not speculate on why this is so to assert that it is a fact and that it seems utterly unlikely that it originated with segregation (though it may have contributed to it). Professor Clark's findings then can be explained without any reference to injury by segregation or by prejudice. The 'scientific' evidence for this injury is no more 'scientific' than the evidence presented in favor of racial prejudice. The cause of science as well as the cause of Negroes, is much better served if we simply stick to the facts: prejudice exists, it is painful to those against whom it is directed — we need only ask them — and not justifiable by any respectable argument, scientific, or moral. Let us

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[26] Ross & VAN DEN HAAG, *op. cit. supra* note 2 at 165-66.

> try to eliminate it then. We need not try 'scientifically' to prove that prejudice is clinically injurious. This is fortunate, for we cannot."

Professor Clark, in his reply, ignores this rather specific argument and instead points out that I do accept Renee Spitz' findings on "hospitalism" even though based "on an unstated number of children," (as though the number of children was decisive). The conclusion that Professor Clark quotes me as making: "it is entirely possible that lack of maternal affection . . . deals a blow. . . ." does not seem to go beyond the evidence presented. But suppose I should be wrong on Spitz. Wherein would that show that I am not right on Clark? Spitz' findings and observations have no bearing whatever on Professor Clark's. The relevance of the matter wholly eludes me.

CONCLUSION

From Professor Clark's experiments, his testimony and, finally, the essay to which I am replying, the best conclusion that can be drawn is that he did not know what he was doing; and the worst, that he did.

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THE DISADVANTAGED

BUSING IS IRRELEVANT:

The Need Is More Fundamental

Effort and money spent, ineffectively, on indiscriminate busing, attempts to teach inappropriate material, and exotic school design—all should be redirected toward changing teacher education, value systems, and educational philosophy

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CONCERN regarding the education of black children has come to be dominated by the emotionally charged question, "Should children be bused to schools out of their neighborhoods?" Embroiled in the violence, shouting, non-debates, slogans, and sentimentalized platitudes are agitated parents, leaders in both black and white communities, opportunistic politicians, and harried educators. All of these people identify themselves as persons most concerned that "quality education" be made available for every child. Yet, the thinking upon which arguments for or against busing are based has little or nothing to do with the goals of education or the means for achieving them. The recently enacted Congressional moratorium on busing has been attacked both by those who favor busing and those who are opposed to it. The busing issue carries such emotional voltage that it has galvanized into action sociological confusion and educational frenzy in the name of democracy.

A reconsideration of the relationship between democracy and education is indicated. One of the main purposes of busing children in order to integrate student bodies is to eliminate the inferior quality of education which exists in many schools where all the students are black. It has been strongly pointed out that, within the democratic concept, as established by our founding fathers, each child is entitled to the same kind of education. The statement, although factually true, is conceptually so erroneous as to defeat the intent of democracy and negate respect for the individual. Even a democratic form of government can not give assurance that each man will be created the equal of every other. The promise made by democracy is that men will be equal under the law and that each will have an equal opportunity for free public education. Because people are unequal in natal endowment and post-natal experience, the aim should not be for education to result in equal achievement. On the contrary, education should provide the means by which each man can achieve his unique potential. Tiger and Fox, professors of anthropology at Rutgers University, point out that "the perfect system would be a true democracy, not because it renders men equal, but because it gives them an equal chance to become unequal. . . . Democratic ideology and theory only [become] self defeating when they confuse the democratic process with egalitarianism."[1]

Let us consider an analogy. Suppose there were a hospital full of patients, each of whom claimed, in the name of democracy, the right to the same treatment. If that claim were honored literally, heart patients, and those with broken legs, high blood pressure, diabetes, skull fractures, and labor pains all would be given the same diets, medicines, and treatment. The moral and ethical components of the democratic concept demand that each person be given equal opportunity for success. Obviously, "the same," literally interpreted, not only does not provide equal opportunity for desirable outcome, but actually handicaps almost all to whom it is applied. The goal is to provide each student with the maximum opportunity to become what he can be.

Examination of the factors required for achieving the goal reveals that some fall outside the function of the school, and that those which are academic should cover a very broad spectrum of possible experiences. None of the requirements are met automatically as a result of a child attending any particular school in whatever economic or social setting. Ideally, all students should attend schools where the motivating philosophy provides for meeting individual needs. This provision consists of a constellation of elements which includes adequate facilities and materials and teachers who can effect individualization. In this context, busing is irrelevant. Under some circumstances, these conditions could not be provided without busing; in others, busing would not be necessary. It well may be that indiscriminate busing actually reduces the opportunity for desirable conditions. In any case, the decision to bus or not to bus can not be justified educationally on the basis of the proportion of racial groups in a school. Racial balance, *per se*, has but nebulous correlation to the quality of education offered to any student, white or black.

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[1] Lionel Tiger and Robin Fox, *The Imperial Animal* (New York: Holt, Rinehart and Winston, 1972), p. 43.

Not all black children are educationally deprived, and not all white children have adequate educational opportunity. In some schools where not a single black child is in attendance, the quality of education leaves much to be desired. However, there are built-in obstacles to success for black children who are educationally disadvantaged. The curriculum is one of traditional design, having changed far less in the last 50 years than the society from which students derive their orientation and interests. The curriculum is not completely appropriate for the average white student; imagine how much less relevant it is for the average black student! With teaching methods, the materials, and the curriculum geared to the idealized experiences, aspirations, vocabulary, and value system of the white middle class, the black child is thrown into a foreign world scholastically. He is expected not only to master the techniques of reading, but to do so in the framework of a vocabulary that is frequently puzzling or meaningless to him, and which is put together to express ideas which are equally unfamiliar. He is required to respond as "expected" or fail. He is supposed to succeed in a game where he does not understand the language or know the rules. He is tested against arbitrary and illogical measures, and the results often are publicized or published. All of this confirms his sense of failure and further weakens his already poor self-concept, which he then tries to refute by escapist, disruptive, or otherwise socially unacceptable behavior.

It long has been recognized that instruction focused on the individual needs of students is the main factor in academic success. To that end, hope has been held out through the use of instructional organization such as team teaching, open classrooms, ability grouping, non-graded classrooms, and others. None of these types of organizaion have resulted in measurable change in student achievement. Many other kinds of remedies have been tried, at great cost and effort. Teaching machines, performance contracts, and Head Start are among those which have come under the purview of the President's Commission on School Finance. Part of the many-volumed report of the commission is an analysis by the Rand Corporation of the various methods which have been tried in an effort to improve educational quality. Their conclusion was that "none of them were consistently and clearly useful." A reason for this notable lack of success lies in the fact that efforts have been directed toward finding more effective ways to teach the standard curriculum to students who, by reason of their cultural experience, aspirations, value system, language patterns, and attitudes toward their own and other races, are unprepared to learn it. The need is not for better techniques to do what is inappropriate, but, rather, for working on those aspects of experience which contribute to learning success.

Few thoughtful individuals are unaware of the relationship between the quality of home and community life and motivation and success in school. Teachers frequently attribute school failure to "the home." Studies have indicated that certain ethnic groups—Chinese, Jews, etc.—produce a higher proportion of academic success among their numbers than do others. The religious and sociocultural patterns of these groups foster strong family relationships and responsibility, traditional and deeply motivating educational aspirations, a "sense of community," and a willingness to forego immediate satisfactions for the sake of long-range goals. These factors, identified with academic success, seem to originate in a value system not ordinarily found among people living in the ghetto, slums, or other depressed areas. Fundamental to the problem of improving classroom achievement is the imperative to encourage a value system which would move toward producing some of the sociological priorities which underlie academic motivation and success.

The President has asked Congress to appropriate very large sums of money for the educational effort, but, if these billions of dollars are poured into classroom-level "panaceas," they will produce results similar to those already deemed ineffective. The skill and creativity of many educators are needed, but immediate and urgent help is required from other sources as well, including anthropologists, sociologists, city planners, pyschologists, leaders in the numerous black communities, and informed policy-makers of the white majority.

One aspect of the problem is the enormous degree of ignorance and misunderstanding about each other which exists in both Negro and white groups. Yet, decisions are made, attitudes are formed, and actions are taken based upon the limited or warped information which constitutes their frames of reference. Unrealistic expectations of quick change in behavior patterns and value systems have resulted in serious impediments to understanding. The disgruntlement of both Negroes and whites is based on views which fail to take into account the total cultural experience of each group and the behavioral attitudes resulting from it.

Cultures vary because of differences in value systems, rites of passages, family organization, food habits, religion, sources of status, kinds and degrees of reciprocal responsibility, and other facets of social organization. Our country derives many of its characteristics and much of its richness of life from its cultural pluralism, but, when the values and attitudes of one culture come into conflict with another, it behooves us to learn more about—rather than to judge—other cultures as well as our own. Stuart Chase said that "he who knows only one culture has none." An anthropologically founded study would lead to reinterpretation of some of the problems, and would place attempts at solutions in a more valid context. Teachers, especially, need this background. Since behavior is a response to one's perception of a situation, a more enlightened perception would result in more useful and intelligent guidance of learning.

Hopefully, the emergence of new understandings and perceptions would permit Caucasians more freely to accept, encourage, and respect a legitimate black culture as part of America. Hopefully, also, new understandings would diminish the need for Negroes to attempt to identify with African cultures through what is, basically, an artificial relationship. Individual blacks, generally, do not know their hereditary or tribal origins. There are no cultural memories or mores with which to identify. There is no link of language or literature. New perceptions of both black and white should go far toward stimulating black people toward recognition of their own worth and potential as contributing members of the American culture.

Change in family and community structure is a process of evolution rather than revolution, but even comparatively superficial directions for change must be promulgated in order to hasten those kinds of activities which have served to prosper other ethnic groups in our country. For instance, the establishment of small businesses is essential. According to Glazer and Moynihan: "The small shopkeeper, small manufacturer, or small entrepreneur of any kind has played such an important role in the rise of immigration groups in America that its absence from the Negro community warrants some discussion. The small shopkeepers and manufacturers are important to a group for more than the greater income they bring in. Very often, as a matter of fact, the Italian or Jewish shopkeeper made less than the skilled worker. But as against the worker, each businessman had the possibility, slim though it was, of achieving influence and perhaps wealth. The small businessman generally had access to that special world of credit which may give him for a while greater resources than a job. He learns about credit and finance and develops skills that are of value in a complex economy. He learns, too, about the world of local politics, and . . . he may also learn how to influence it, for mean and unimportant ends, perhaps, but this knowledge may be valuable to an entire community.

"The small business created jobs. . . . These were not only jobs, they also taught skills. In addition, the small businessman had patronage—for salesmen, truck drivers, other businessmen. In most cases the patronage stayed within the ethnic group."[2] Some small businesses might be started as cottage industries by women who are confined to the home by the presence of small children. In such cases, efforts could be pooled by a group of women. Aid in developing marketable skills and finding outlets for the products should come from those having proficiency in these areas.

Various aspects of education such as budgeting, food preparation, sewing, simple carpentry or upholstering, and family relations should be brought to the neighborhoods where the people feel at home and can attend without having to resort to public transportation.

Churches, once the most influential of institutions among black populations, need to reassert strong leadership of their congregants through translating religious precepts into practical action toward elevating the quality of family and community life. The formation of self-help organizations should have high priority, not only for the direct service they can afford in terms of counseling, scholarships, clinics, family service, loan agencies, and co-operative groceries, but for the equally important cause of increasing a community sense of mutal responsibility and accomplishment. Concerted effort is warranted in involving the youth in the satisfactions which come from making essential contributions to the community welfare.

There are people in the Negro community who are well-qualified to serve as models for the young. The talents of leaders have been used, to a great extent, in communicating with various governmental bodies or agencies, but even more important is the use of these talents to help the group to help itself at the grass-roots level.

Benefit accrued through spending exhorbitant amounts of Federal funds on innovative methods, teaching aids, or exotic school design is infinitesimal. According to Sidney P. Marland, Jr., U.S. Commissioner of Education, "The evidence is very thin of gains from Federal money aimed at bringing up the achievement levels of children—perhaps as many as twelve million—from disadvantaged homes." Available funds might be directed more profitably toward encouraging the development of a viable and supportive community structure and toward changing the perspective from which the purposes, procedures, materials, and methods of education are viewed.

Improvement in teacher effectiveness needs attention in at least three areas: qualification standards for acceptance as an education major, pre-service education, and in-service growth. With knowledge and information being amassed at a headlong rate, the old saw that "education is knowing where to find the information" seems to be confirmed as a verity. With the advent of information retrieval methods, an "educated" person might need to know only which buttons to push. The increasingly complex and demanding problems of human existence require that we know where to find information and how to apply it. Intellectual curiosity, mental and psychological vigor, and recognition of the necessity of continuous learning are important ingredients of meaningful education. Can these characteristics be encouraged by teachers who, by themselves, are devoid of them?

In accepting students for admission to teacher education programs, these and other essential qualities and attitudes rarely are taken into consideration. In a profession where intelligence and academic interest should be *sine qua non,* the most mediocre accomplishment is acceptable. The methods of teaching and the kinds of standards which generally prevail in teacher education usually do not require or inspire more than minimal student effort. Although some change is taking place in the orientation and content, the weight of traditional requirements, content, and method rests heavily upon many professors and state certification agencies. With too few exceptions, the lecture is used to extoll the virtues of other preferable methods of teaching. Alternatives to note-taking as the principal conduit of learning must be utilized if teacher education is to assume its full responsibility for more adequately preparing its graduates to resolve the urgent problems of education.

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[2] Nathan Glazer and Daniel P. Moynihan, *Beyond the Melting Pot* (Cambridge, Mass.: M.I.T. Press, 1963), pp. 30-31.

In-service education for teachers usually takes the form of courses, seminars, workshops, or conferences. These forms sometimes have practical value, but the time and money expended might have more significant results if the participants, with competent supervision, had the opportunity for immediate practice and application in their classrooms of the things learned. With the exploration of theory and practical application occurring simultaneously—along with other kinds of direct, concentrated help to teachers—a more optimistic view could be taken of the possibility of prompt improvement in the quality of education.

Lack of funds is the reason for the postponement of reduction of class size, probably the most eagerly sought change toward improving instruction. However, teachers who are ineffective through lack of qualification will remain ineffective, regardless of any magically reduced class size. Teachers who are skilled and involved with children could be vastly more effective if classes were smaller.

Time and effort—and money—should be spent in drastically revising curricula in the direction of much greater flexibility, with emphasis placed on internalizing experience, rather than on material to be covered. Creative materials of types different from the usual textbooks, films, and maps must be developed. They must include more relevant content, realistic vocabulary, and meaningful orientation, and they must provide a variety of stimulating experiences which go beyond the classroom. Textbooks, which for so long have influenced—both positively and negatively—what was taught, may have outlived their usefulness in the context of their philosophy and format. Perhaps there should not be textbooks in any subject, but, rather, a series of smaller books or pamphlets, each devoted to a single topic, area of interest, or problem. This would encourage the designing of individual courses of study out of a very large number of possible combinations. Such materials could be constructed to be used in tandem with films, stereo-cassettes, field trips, experiences with community agencies, or other teaching devices.

Fundamental change has taken place in the sources and scope of learning to which students are exposed as part of their daily environment, and in their interests and needs, as well as in techniques for obtaining, reproducing, and storing information. It seems self-evident that techniques in teaching should parallel these changes; yet, they have not done so. With only superficial changes, schools still are organized as they were 50 years ago. Children still are sitting and listening for most of the day. They still are reading material from the same book at the same time, and this may have meaning for far fewer than the majority of them. They still are responding in recitation settings to questions which exercise their powers of recall rather than their ability to apply knowledge or to extend thinking.

Psychological research indicates that the variety of learning styles to be found in any classroom can be accommodated better in settings less structured than that of grade levels. The trend to knock down walls to permit a more flexible physical environment should be the forerunner to knocking down the walls of tradition and habit in order to provide more flexible learning groups. Marking systems and promotion policies, now often considered sacrosanct, would be irrelevant in the revised educational philosophy. Evaluation of student need would replace judgements of failure or superiority.

People of economic privilege in our own and other countries sometimes send their children to private boarding schools so that they may profit from a higher quality of education than that available in their communities. In a controlled and enriched environment, more attention is given to individual needs, interests, and learning styles. Acquiring positive social attitudes and good study habits are among the priorities.

Some private schools are organized in a series of cottages where students share a "family" life, developing feelings of responsibility and belonging. Such educational experiences should be considered for economically and educationally disadvantaged children of any ethnic derivation. Some funds designated for educational improvement might be used to establish a few such schools as prototypes. The programs of these schools should not have as their purpose the "flattening out" of cultural differences, but, rather, the encouragement of biculturalism which, like bilingualism, permits living more comfortably and constructively in more than one culture.

Although some students come eagerly to their first school experience, their eagerness soon is replaced with boredom and resistance. The current educational process only briefly engages the voluntary attention of those who, in the future, will determine the kind and quality of life in our country. Educational funds must be directed toward the significant and productive goals of changing the orientation of teacher education, developing challenging and relevant curricula and materials, and offering the kind of help to culturally depressed groups which will encourage the evolution of attitudes of family and community responsibility and feelings of self-worth.

Success in education is dependent upon these fundamentals, rather than upon techniques for teaching the inappropriate or upon the educationally myopic policy of indiscriminate busing.

in Levine and Havighurst,
The Future of Big-City Schools
(1977)

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16. Developing and Implementing Big-City Magnet School Programs

Daniel U. Levine and *Connie Campbell*

Five years ago the term "magnet school" was virtually unknown. Today it is widely used to refer to an important movement for the improvement of public schools, particularly in big cities. Senator John Glenn and other members of Congress have been working to provide substantial funding for the development of magnet school programs. A national conference on magnet schools attracted hundreds of representatives of school districts to Houston, Texas, in the spring of 1976. Magnet programs have already been established in Boston, Cincinnati, Houston, Milwaukee, Minneapolis, St. Paul, and St. Louis. Planning groups for magnet programs have been organized in other big cities throughout the country. Few other movements in American education have spread so quickly.

There appear to be at least four reasons for the growing interest in magnet schools. First, such schools are thought to have a potential for reducing racial isolation in large school districts that are confronted with legal pressures for desegregation. Boston, Milwaukee, and St. Louis are implementing magnet programs as part of court-ordered desegregation plans, while Cincinnati, Houston, and Minneapolis moved to establish magnet schools in advance of specific court orders. In either case, magnet schools are offering attractive programs that will, it is to be hoped, persuade parents to send their children to desegregated schools. Second, most magnet programs offer a variety of options, usually including "open" educational environments as well as "fundamental" schools that stress structure, rules, and basic academic skills. Third, the improvement of instruction in big-city schools is a major goal of magnet programs. Fourth, federal, state, and local funding is potentially available to support the development of magnet schools.

Magnet schools have been operating in some cities for many years, although they were not so designated until recently. New York has long had specialized district-wide high schools in science and in the arts. Boston's Latin School, which emphasizes academic achievements, has attracted top students from throughout the city for years. Many cities have offered advanced vocational programs at district-wide schools similar to some of the high schools now being established as part of magnet programs.

It is appropriate to ask whether there is anything new about the magnet school movement. We believe that the present movement is distinctive. First, it aims to serve a much larger clientele than the selective magnet schools of the past in that it includes programs for average-achieving students and for students whose special talents were generally ignored until the recent developments in diversified magnet programming. Second, it clearly incorporates social goals involving desegregation and the future of the cities, whereas previously such goals were seldom considered, much less made explicit. If carried out successfully on a sufficiently large scale, the magnet school movement may make an important contribution toward improving the quality of life in our cities and metropolitan areas.

But expenditures for magnet schools will prove justified only if the movement succeeds in accomplishing its goals. As with any innovation, there are many ways of mishandling development and implementation, and many problems will be encountered in working to attain the goals of the program. Our purpose in this chapter is to call attention to certain considerations that appear to be most important in planning magnet programs.

ADMINISTRATIVE REQUIREMENTS

We turn first to the identification of administrative and organizational requirements for the successful development of magnet programs, drawing largely on our study of the program in Houston. The magnet school plan in Houston was prepared by an administrative team of school district personnel. Having been released from other duties, several members of this team were able to spend a considerable amount of time in working on the plan. Team members were knowledgeable about programs and individuals throughout the district and could determine whether magnet concepts might work well in a given school. Team members and other personnel from the central office of the school district were in a position to identify building administrators who could provide strong leadership. Experience has shown that the success of an innovative magnet program depends heavily upon such leadership. Principals must act vigorously to recruit students and faculty, to coordinate schedules, and to solve other problems associated with a new magnet program. It would be a serious mistake to underestimate the importance of choosing outstanding administrators for magnet schools.

What is equally important, the general superintendent, other top-level administrators, and area superintendents in Houston consistently demonstrated strong commitment to the project.[1] They helped especially in persuading principals in the nonmagnet schools not to subvert the recruitment of students for magnet programs. They provided assistance in communicating with potential students. In Cincinnati and Minneapolis also, the superintendents and their key staff members have been closely identified with and strongly supportive of their magnet school programs. The importance of top-management support may seem self-evident, but we have seen many highly publicized and outwardly impressive urban education programs fail partly because the backing of top management consisted only of a formal endorsement followed by continuous neglect.

Resources for Magnet Schools

The development of a successful magnet school program can be expensive. In Houston, approximately $4 million was spent to initiate magnet programs at thirty-one campuses during the 1975-76 school year. In St. Louis, the magnet program was budgeted at approximately $7 million for a maximum of 3,820 students for 1976-77, roughly double the average per pupil expenditure in other public schools in that city.[2] In Boston, magnet school programs are being developed with much assistance from higher educational institutions and from business, at a cost that is very difficult to calculate in dollars. In Chicago, approximately $31 million was spent to build a highly specialized facility for the Whitney Young Magnet High School that is expected to enroll 2,000 students, excluding those in a special program for students with hearing impairments.

It should be noted, however, that much of the money for magnet school programs is used for initial rather than recurring expenditures in order to meet costs for planning and for facilities and equipment. A number of programs, particularly at the elementary level, do not require annual expenditures much in excess of normal costs per pupil.

Sufficient Planning Time

It may be tempting to initiate a magnet school program very quickly in order to alleviate pressures for desegregation and to move rapidly to reduce white or middle-class withdrawal from the public schools. Experience suggests, however, that ample time must be allowed for the development of magnet programs.

In Houston, approximately five months elapsed between the appointment of the administrative team and the opening of the magnet school program in the fall of 1975. Although the magnet schools constitute a small fraction of the schools there and only a few thousand students have changed schools, the plan calls for fundamental changes in instructional arrangements in some of the participating schools. The schools in Houston had already completed a major assessment of needs for each school, in which principals worked closely with communities to identify goals and programs for their schools. If this assessment had not been undertaken and if the plan had involved an integration effort directly affecting a majority of the district's pupils, five months would have allowed too little time for planning. Officials had already had considerable experience in arranging "majority-to-minority" transfers. Many of these transfers of students were incorporated into the arrangements for magnet school programs. Other students were transported by special magnet school vehicles. Had these arrangements not been possible, the number of students transferred to magnet schools might have been much smaller, and transportation would have been less efficient.[3]

A period of approximately six months was available for planning the magnet program in St. Louis, but final court approval was not forthcoming until June 1976, and so recruitment of students for the following fall was not completed until after that time. According to Samuel Miller, executive director of the program, this shortage of time for recruitment helped to explain why the magnet schools opened with an enrollment that was 70 percent black instead of the planned enrollment of 50 percent black and 50 percent white. "If we had done all of our student recruitment during the school year . . . our job would have been a lot easier."[4]

The length of time needed to plan a new instructional program, select and prepare teachers, recruit students, and establish relations with community institutions that can serve as resources will, of course, vary. We believe, however, that the planning of a magnet program for 3,000-4,000 students requires at least nine or ten months of intensive planning.

Publicity

In launching a magnet school program widespread publicity is needed in order to attract students from all over the city and to build confidence among middle-class families in the quality of instruction in such a school. Some cities have gone well beyond usual practices to provide the public with information. In Cincinnati, special packets containing application blanks and listing sources of additional information were sent home to parents. Hundreds of community meetings have been held, and community support groups have been working actively in Cincinnati to explain and seek support for the alternative school programs, partly because district officials have found that grass-roots communication is vital in convincing parents to send their children to schools outside their local neighborhoods. The Houston school district furnished transportation from the central office to magnet school sites for interested parents who wanted to visit one or more programs before enrolling their children. In Boston, material describing the magnet school program was printed in seven languages. In both Cincinnati and Houston, detailed newspaper accounts described magnet programs, and campaigns to recruit students were conducted on radio and television. Without such special efforts neither city would have come close to reaching its goals for recruiting students.

Security

Security of students is an important consideration when magnet programs are located in deteriorated neighborhoods, as has been the case in some cities. Many parents believe that it could be dangerous for their children to attend such schools. Steps may have to be taken to reassure parents that their children will be safe. This is especially true in cases where a select group of students in a magnet program constitutes only a small proportion of the total student body in the building where the program is housed. Magnet schools located in inner-city areas may have to provide supervised transportation if they hope to attract students from outlying parts of the city or from suburbs. St. Louis has established a policy providing for such arrangements: "Students attending the magnet schools will be picked up by specially chartered buses in their neighborhoods . . . and will be transported directly to the school. The buses will be supervised and the children will be dropped off at the school's doorway or within the schoolyard itself. They will be returned home with similar care."[5]

INSTRUCTIONAL ISSUES

The planning of instructional programs for magnet schools raises questions that need to be resolved. Four such questions will be discussed here: How different will the programs in magnet schools be from those available in conventional schools? Will students and magnet programs be properly matched? Will the use of external resources be an integral part of the magnet programs? Will magnet schools be organized so as to promote integration?

Planning for Programs That Are Different

Special purpose schools have existed in some cities for a long time. The Houston Technical Institute (part of the magnet program initiated in Houston in 1975) and the specialized vocational and technical schools in Chicago and other cities are examples. There could be a strong temptation in the future merely to attach the label "magnet" to such schools without making really significant changes that would justify the use of such a label. In other high schools, students could be provided with an additional hour each day for scientific subjects, and the schools could then be renamed "magnet" schools. They would not deserve the designation unless some genuinely innovative ideas were employed to give the science program new strength.

At the elementary level, meaningful efforts have been made in most cities to introduce individualized instructional procedures, but such changes sometimes amount to little more than fancy labels when there has been minimal or no change in practice. We are reminded of the "ungraded" schools and schools with "continuous progress" programs that we have seen in several cities where both staff and students continue to refer to the first, second, or sixth grade and where continuous progress means only that students are no longer retained in a grade because of academic failure. We also believe that some "fundamental" or "traditional" magnet schools publicize their disciplinary procedures to a greater degree than they have done in the past, but do little more than before to provide, as they claim to do, more structured guidance to help students master basic learning skills.

We are concerned, therefore, that attractive new magnet school programs may be designed merely to appeal to modish yearnings for either "free" or "disciplined" schooling on the part of different groups of parents. We fear also that some magnet programs will really not be characterized by the changes described in press releases about them from the central office. Under such circumstances, magnet school programs may generally disappear, as have other highly publicized programs that have preceded them, without having contributed much to the improvement of learning opportunities in big-city schools.

Matching Students and Programs

Big-city magnet programs with which we are familiar place little emphasis on determining whether students are selecting programs that are most suitable for them academically and intellectually. Instead, nearly the entire emphasis frequently appears to be on providing options—options that parents and students may elect to pursue, whether appropriate or inappropriate. The assumption seems to be that parents and students are the best judges of the available alternatives and should be left alone to make their choices. There is, of course, much to be said for enlarging options in schools and for regarding clients as capable of making their own decisions. We do not believe, however, that parents and students generally have been receiving sufficient information and guidance to make wise decisions. We fear, in particular, that too many choices are being made largely on ideological grounds with little attention to the problems and learning styles of individual students. This may be happening among middle-class parents who elect to send their children to relatively unstructured magnet schools of the open classroom type without considering whether the children can function independently in such a setting. It also may be happening among parents who feel that disciplinary practices in local schools are lacking and that enrolling their children in "fundamental" magnet schools will result in academic gains, regardless of how the child might function in this highly structured situation. For these reasons we are not optimistic about the degree to which various types of magnet schools are likely to benefit many of the students who choose to enroll in them.

Several researchers have worked out methods for diagnosing learning differences and for devising differentiated instructional treatments appropriate to such differences.[6] Administrators could draw upon these ideas as they work out their own methods for matching students to magnet programs. Some studies suggest that students of differing social backgrounds tend to learn best in environments specifically geared to their particular learning needs and stages of development. For example, David Hunt and his colleagues conducted studies in which it was found that students with "high" conceptual abilities learned more in relatively unstructured classroom settings than in structured ones. The opposite was true for students whose level of conceptual development was less complex.[7] A disproportionate number of students at the lower levels of conceptual development tended to come from economically disadvantaged families. The findings suggest that instructional programming should take into account the learning styles and cultural backgrounds of students before they are assigned to differentiated learning environments. Robert F. Peck has noted that these considerations are also important across cultures:

> There are important differences in the dynamics of the learning process among students of different cultures. No single style of teaching works equally well with all of them . . . . In a ten-year, eight-country study of coping style and achievement, the most outstanding finding was not one of national, sex, or age differences, but the large, systematic deficit in educational achievement of . . . working-class youth in all countries. What is more, the working-class youth showed many parallel deficits in coping skills and in self-esteem in most of the countries. As might be expected, numerous interacting effects were observable with age, sex, and social class.[8]

The magnet school movement recognizes that students differ in learning needs, and magnet schools attempt to provide diversified instructional environments in which these differences can be addressed. Parents should be adequately apprised of the characteristics of the program that may be most suitable for their children. Also, magnet schools should emphasize the development of more individualized programs within each school, such as Individually Guided Education (IGE), Program for Learning in Accordance with Needs (PLAN*), and other instructional systems that may make it possible to select appropriately differentiated learning activities for students.[9]

Utilization of External Resources

One of the important goals of most magnet school programs is to utilize resources outside the school to enhance the interest of students and to improve the appropriateness of instruction. Magnet schools in Boston draw on the resources of higher education and business more systematically than has been done heretofore in large cities. In St. Louis, business has been similarly involved in carrying out several magnet programs. At the High School for Mathematics and Science several firms (Emerson Electric Company, Mallinckrodt Incorporated, and the Monsanto Company), in collaboration with the Washington University Medical Center, are helping to develop and teach new curricula. Numerous cultural organizations, including the St. Louis Symphony, the Art Museum, and the Municipal Opera, are also providing services that help make the two magnet schools for the visual and performing arts more attractive to potential students.[10]

Utilization of prestigious outside resources undoubtedly aids in attracting clients and can improve the quality of instruction in schools. It is relatively easy to assert that a relationship has been established with an outside institution or to send students and staff into the field to learn. It is more difficult, however, to work out cooperative relationships that make these external resources an integral part of a major school program. To do so often requires changes in practices for grouping students, in school scheduling patterns, and in budgeting or accounting regulations, not to mention changes in traditions of school governance and in the attitudes of all participants.

Magnet Schools and Integration

There is reason to believe that decisions about the structure and organization of magnet schools will determine to a great extent the patterns of interaction among pupils. These patterns reveal whether the goals of integration are being pursued intelligently or are being defeated in practice by instructional arrangements that make them difficult or impossible to achieve. If students are grouped homogeneously within a magnet school on the basis of academic test scores and if that grouping separates students of different racial backgrounds for most or all of the school day, it is difficult to see how integration is being promoted. In a similar way, if students in a magnet program are spending most of the school day in a separate wing of the school, the degree of integration in the school as a whole may be minimal. As Elizabeth G. Cohen has pointed out in a review of the research on the effects of public school desegregation on race relations, "knowledge that a school has 20 percent black students tells us nothing about the critical conditions in that organization favoring one type of social interaction over another. The school must be analyzed in its organizational context as an institution which strongly structures the nature of the contact between the races."[11]

Cohen's own research on desegregation among students has been based on the widely accepted premise that intergroup activities are most likely to have positive results when they are based on "equal status" contact. Schools should be examined, she points out, "not so much in terms of racial composition, but in terms of the conditions necessary for 'equal status contact.'"[12] Cohen has conducted a series of laboratory-type studies that examine the behaviors and performance of students in interracial groups. Her results suggest that "expensive and radical changes in the social structure of the school and its curriculum content may be necessary"[13] if the goals of integration are to be accomplished in the schools.

A recent study of a magnet-type middle school illustrates how organizational and instructional arrangements in a magnet school can affect the goals of integration. In that school, organization facilitated integration in the sixth and seventh grades. (In the eighth grade, however, an accelerated academic track was comprised largely of white students, while a regular track was comprised largely of black students.) Some of the administrative and organizational characteristics that contributed to positive interracial contact in this school were described as follows:

> School authorities clearly endorse positive intergroup relations and support an extensive program of activities designed to help students get to know one another. The fact that Wexler's students come from 26 different feeder schools is also conducive to the formation of new interaction networks since many children have none of their previous classmates in their new classes. The fact that the school is new has greatly increased the opportunities for students to be cooperatively involved in working for shared goals. For example, large numbers of students participated in the formation of new special-interest organizations and in a variety of fund-raising activities. . . .

> Wexler's commitment to fostering equal status contact is illustrated by its staffing. The top four administrative posts are evenly divided between blacks and whites. Similarly, each grade has two counselors, one white and one black. . . . Equal formal status for white and black students is supported by the policy adopted in the sixth and seventh grades of distributing black and white students into individual classes roughly in proportion to their numbers in that grade.[14]

SOCIAL GOALS

Magnet schools are often seen as an integral part of an urban educational program directed toward the attainment of social goals relating to racial and socioeconomic balance in the public schools, to the improvement of educational opportunities for inner-city students, and to the long-range development of the central city and the metropolitan area.

Racial Balance

One of the foremost goals of many magnet school programs is to eliminate or reduce the number of schools where one race predominates. No universally accepted standards exist to define such schools or to determine when a school is no longer racially segregated. For this reason, school officials sometimes have considerable leeway in planning to meet goals of racial balance through magnet school programs and in deciding whether these programs are moving far enough and fast enough in the direction of desegregation to satisfy those goals.

There is, presently, room for debate regarding the impact of existing magnet programs on desegregation, as well as the potential of these programs for reducing segregation in the future. Desegregation goals necessarily vary from district to district because they reflect each district's unique demographic situation and its external pressures for desegregation. It is difficult, therefore, to discuss desegregation in magnet schools in general terms.

In Houston, the magnet school program was initiated voluntarily following the failure of court-ordered arrangements for the pairing of schools—arrangements that clearly had been increasing rather than reducing segregation. In Cincinnati, school officials initiated a large-scale magnet alternative program while a desegregation suit was firmly mired at various levels of the court system. In Milwaukee and St. Louis, by way of contrast, magnet school programs are being developed more directly in response to court cases involving desegregation. One obvious implication is that school officials interested in achieving desegregation through magnet schools should initiate such a program well in advance of external pressure from the courts and the federal government. Otherwise, they may lack the time needed for careful development of such a program.

An examination of the data on the racial composition of enrollments in magnet programs in Houston and Cincinnati can provide some preliminary indication of the effects of these programs on integration. As Houston officials are the first to point out, the magnet school program there was not a plan for the racial integration of the district as a whole. The major desegregation goal, to be achieved by 1977, was to reduce by thirteen the number of schools that had minority or nonminority populations of 90 percent or more.[15] (In 1976, 109 of Houston's 234 schools were predominantly one-race schools by this definition.) During the school year 1975-76 thirty-four magnet school programs were established, and, by 1977, 5,000 students were to be transferred into those programs.

Even though Houston's goal is limited, experience there suggests that the magnet school approach can help to achieve some movement toward stable integration in a big-city district. During the 1975-76 school year, 587 minority students (black and brown) and 670 white students transferred into magnet schools with enrollments between 25 and 75 percent minority during the previous year. Altogether, approximately 4,600 students from a total district enrollment of about 213,000 had transferred into magnet programs as of August 1976, a figure that was only 400 short of the district goal of 5,000.[16] While some of these transfers probably are attributable to white withdrawal from low-status minority schools, they nevertheless represent gains in integration as compared with the situation that developed in the original plan for paired schools. Only four schools, however, became less than 90 percent minority or nonminority in 1975-76 as a direct result of the magnet program—less than half the number Houston officials had hoped to achieve through the program.

It should be noted also that many of the magnet programs being developed in Houston provide for only limited contact between pupils of differing racial and ethnic backgrounds. At the elementary level, for example, students in the cluster magnet schools join students of different racial and ethnic backgrounds for only one week a year; thus the opportunity for a meaningful reduction in racial isolation is limited.

The pattern in Cincinnati appears to be somewhat similar to that in Houston. Many of the magnet programs have a good balance of minority and nonminority students, often approaching a 50-50 ratio, and many of the students in these programs previously were in schools that were either predominantly white or predominantly minority. As shown in Figure 16-1, white enrollment declined at a slightly slower rate in 1975 and 1976, after the alternative program in Cincinnati was initiated on a sizable scale, than in the preceding three years. What is even more encouraging, the Taueber segregation index, which indicates the percentage of students of one race who would have to transfer in order to achieve a racial balance in each school reflecting the district racial balance as a whole, has declined substantially since the alternative program was announced in 1974. As shown in Figure 16-2, the index for 1976-77 was lower than it has been since 1963.

On the other hand, as shown in Table 6-2, in only three of fifty-two schools with a black population of 50 percent or more in 1974-75 was there a reduction of 5 percent or more in enrollment of black pupils in 1975-76 when the alternative programs were initiated. Thus, Cincinnati, like Houston, still has a long way to go in reducing racial isolation and in overcoming trends that have resulted in resegregation of big-city schools during the past two decades.

It must be kept in mind that both Houston and Cincinnati, like many other big-city districts, had been experiencing a serious continuing decline in white enrollment during the late 1960s and early 1970s. Houston Superintendent Billy Reagan believes that the magnet programs can help to stop this decline by offering attractive learning opportunities and by allaying fears that the district would be ordered into forced busing.[17] In Cincinnati, the magnet programs have been credited with drawing 1,076 students back from private schools for the 1975-76 school year, leading Donald R. Waldrip, former superintendent, to observe that investment in the magnet alternatives there "will continue to yield benefits, while an even greater investment in forced busing would lead only to massive flight."[18] The results achieved in Houston and Cincinnati provide encouraging evidence that magnet school programs can help to increase racial integration.

Socioeconomic Balance

To our knowledge, no systematic information is available on the socioeconomic composition of the enrollment in magnet schools in Houston, Cincinnati, or other cities that are developing fairly large-scale magnet programs. Where magnet programs are selective, as

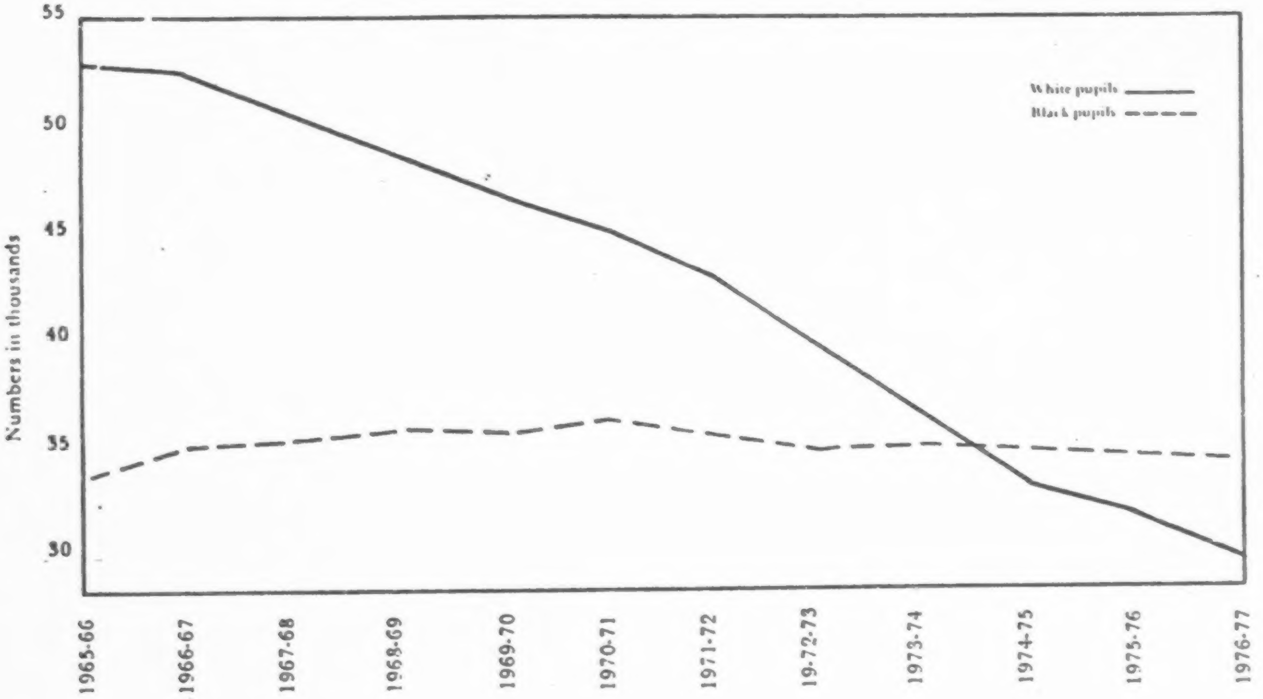

Figure 16 1

Enrollment in the Cincinnati public schools by race and year, 1965 66 to 1976 77 (*Source:* Cincinnati Public Schools)

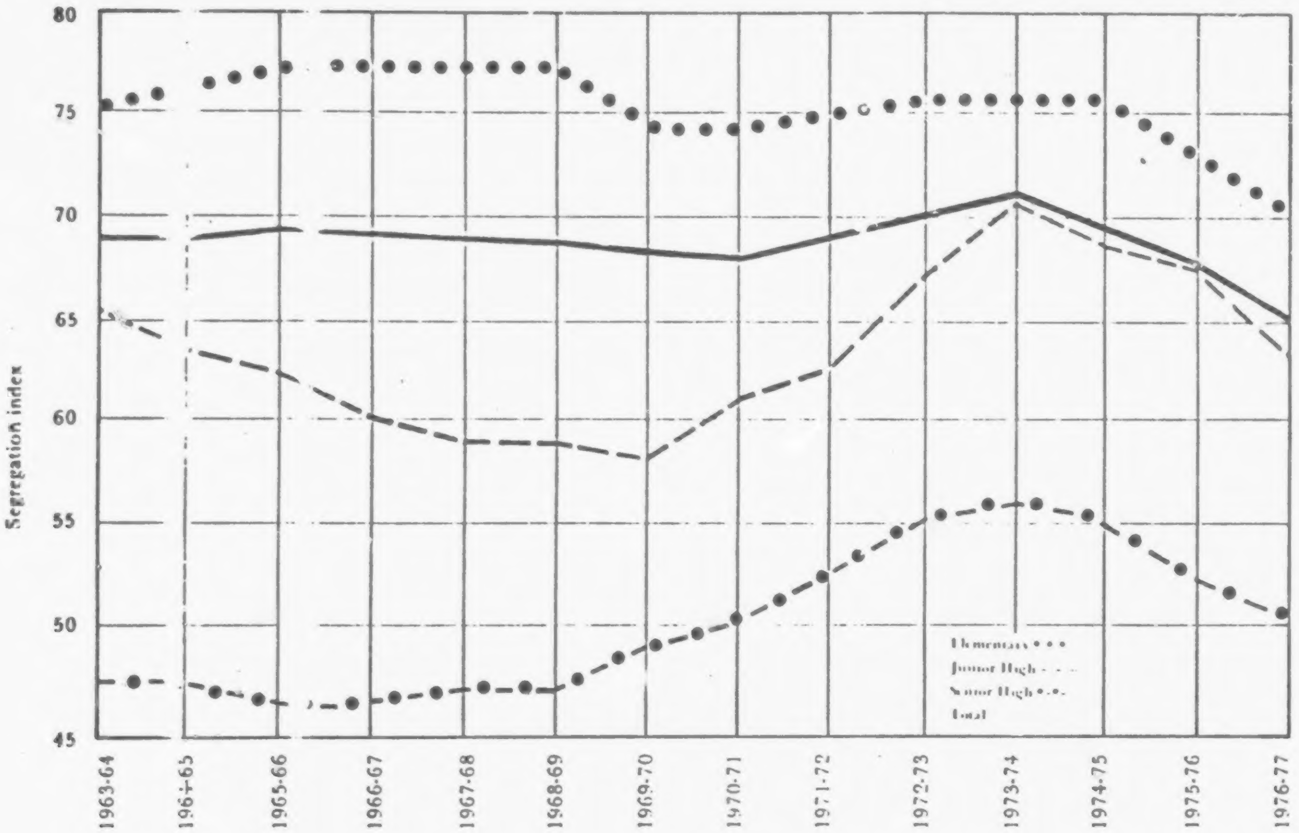

Figure 16-2
Taeuber segregation index for the Cincinnati public schools by level and year, 1963-64 to 1976-77
(*Source:* Cincinnati Public Schools)

many are, it is virtually certain that a large percentage of students come either from middle-class families or upwardly mobile families of low socioeconomic status. This appears to be the case regardless of whether or not a magnet program is racially segregated. At the racially integrated Whitney Young Magnet High School in Chicago, for instance, only a limited proportion of black students accepted for admission come from low-income families whose children are eligible for free lunches. As is true with respect to racial integration, magnet school programs may be providing very little socioeconomic integration on a city-wide basis.

Effect of Magnet Schools in Inner-City Schools

Magnet programs may actually detract from the quality of instruction in inner-city schools by draining off the best students and teachers, leaving those schools even more devoid of positive academic leadership than they were in the first place. Such a tendency could be particularly pronounced with respect to programs designed to encourage inner city transfers to attractive schools elsewhere, whether or not those schools are officially designated as magnet schools. Monroe Swan, the only black member of the Wisconsin Senate, voted against a law facilitating city-suburban transfers because he felt that the suburban schools would try to enroll only the most talented minority students of the central city—to "rip off the cream of the crop," for which the state would then provide the suburban schools with a bounty.[19] School officials in cities where magnet programs have been established seem cognizant of the potentially negative effects of such a practice. Several officials in Houston, while aware of the problem, hoped that the loss of top students through transfer would allow new leadership to emerge in regular inner-city schools.[20] James W. Jacobs, superintendent in Cincinnati, has also expressed concern about the problem. In both Cincinnati and Houston, efforts are being made to improve instruction in inner-city schools and other nonmagnet schools by reducing the size of classes, providing better equipment, increasing the number of teachers' aides, and otherwise working to improve the effectiveness of neighborhood schools.

We are not convinced, however, that such efforts are likely to be successful unless they are part of a systematic and far-reaching program for improving instruction on a school-by-school basis throughout an entire district. The danger in concentrating too heavily on magnet schools, which are probably the most flashy and salable component of a program for instructional improvement, is that massive physical and human resources will be used for them while other components of such a program will get little attention. If this is allowed to happen, inner-city schools will continue to be undesirable places for learning, and the educational opportunities for young people in the big city will not be markedly better in the future than they are today.

Urban Redevelopment

It is possible that magnet schools may play a vital role in the redevelopment of the inner city and in the conservation of racially and economically mixed neighborhoods by offering the superior opportunities for schooling needed to retain middle-class families in the central city. In Houston, school officials believe that their magnet program has helped encourage movement of young middle-class families into several deteriorated neighborhoods where older but structurally sound houses are now being restored. In Cincinnati, the magnet programs may be contributing to stability in attractive renewal neighborhoods such as the Walnut Hill neighborhood and the Mt. Adams area, which is close to already redeveloped parts of the central business district. Our description in Chapter 9 gives some indication of what the Whitney Young Magnet High School might contribute to the overall renewal of Chicago. But the generalization that magnet schools may play a major part in city planning cannot be viewed as an established fact in any city. Indeed, this generalization can never be much more than a hypothesis until school and other government officials in some city do more to break down the walls that have traditionally separated public school planning from most municipal planning efforts.

CONCLUSION

We have tried to identify some of the key considerations in developing and implementing a big-city magnet school program that not only might enroll a significant number of students, but also might appreciably improve educational opportunities and contribute to improving the overall quality of life throughout a city. On the basis of this analysis, one might construct a continuum for characterizing the seriousness, utility, and comprehensiveness of big-city magnet school programs. The two poles of the continuum could be described as follows.

The Magnet School Hustle

Largely an attempt to satisfy the actual or probable desegregation requirements of a federal court, the magnet school plan is hastily thrown together, and a few hundred middle-class or upwardly mobile low-status students are induced to enroll in it. Much of the program consists of established components given glamorous new labels, and use of these labels makes it politically feasible to divert more resources to schools enrolling a substantial proportion of middle-class students or to schools in which middle-class students are taught separately in a magnet class. A limited number of middle-class families are thereby persuaded to keep their children in the public schools for a few more years, often at substantial costs for transportation and instructional programming.

Meanwhile, a large proportion of students in the central city continue to attend predominantly one-race schools; some of the best students and teachers from dysfunctional, predominantly low-status schools transfer to the magnet schools; and, although a few superficial advantages such as slightly reduced class size may accrue on paper to some of the inner-city schools, the central city as a whole and its school district remain for the most part racially and socioeconomically segregated and continue to evolve still further in this direction at a slightly slower rate.

Magnetization for City Renewal

Before a court order for district-wide desegregation is imminent, school officials begin to develop a magnet school program designed to improve educational opportunity for a few thousand students, to contribute to the redevelopment of the inner city, and to help maintain high-quality neighborhoods in the central city and the metropolitan areas as a whole. Following a year of careful planning, a substantial program is aimed initially at improving the match between the learning styles of students and the public school opportunities currently available to them and at maintaining and increasing racial and socioeconomic balance in schools and neighborhoods. In the following few years the program is painstakingly expanded to include as much as 40 percent of the public school students in the central-city schools.

At the same time, care is taken not to deprive predominantly low-status schools of their best students and faculty, substantial resources are made available and used to support efforts at systematic reform in these inner-city schools, and an overall plan for improving the quality of instruction available to all students in the district is worked out and implemented. Civic and business leaders and other interested citizens are enlisted to support all these activities as well as efforts, where appropriate and possible, to expand the magnet school program to include suburban school districts around the central city. School planners begin to work closely with municipal and metropolitan planning agencies to establish magnet school facilities in present or potential neighborhoods designated for urban renewal or community conservation. By the end of a ten- or fifteen-year period, attractive public school opportunities are available throughout the central city and the metropolitan area, and socioeconomic and racial isolation have been substantially reduced.

This admittedly visionary description of what magnet schools might help to accomplish is far from realization in any big city at the present time. It cannot be achieved, furthermore, unless magnet school programming is explicitly worked out in conjunction with other aspects of educational policy and planning that are mentioned elsewhere in this book, particularly in Chapter 17. Magnet school programs will not by themselves contribute much to the solution of major problems in our large cities, but the degree to which magnet schools are coordinated with educational and community planning will have a major bearing on whether or not the neighborhoods in which they are located will continue to deteriorate or will, instead, constitute magnetic nuclei for city renewal.

Notes

1. A Project Management Committee consisted of the Superintendent for Instruction, the Executive Deputy Superintendent for Instruction, the Deputy Superintendent for General Instructional Services, the Deputy Superintendent for Administration, and the Deputy Superintendent for Occupational and Continuing Education.

2. Martha Shirk, "Board Reviewing City 'Magnet School' Plan," *St. Louis Post-Dispatch*, February 10, 1970, 3A.

3. Daniel U. Levine and Connie Moore (Campbell), *The Magnet School Program in Houston, Texas: A Description and Commentary* (Kansas City, Mo.: Center for the Study of Metropolitan Problems in Education, School of Education, University of Missouri-Kansas City, 1976, mimeo); *id.*, "Magnet Schools in a Big City Desegregation Plan," *Phi Delta Kappan* 57 (April 1976): 507-509.

4. Jeff Gelles, "Selling the Magnet Schools to Parents," *St. Louis Post-Dispatch*, September 1, 1976, 3A.

5. *Ibid.*

6. Herbert Thelen, *Classroom Grouping for Teachability* (New York: John Wiley & Sons, 1967); Bruce R. Joyce and Marsha Weil, *Models of Teaching* (Englewood Cliffs, N.J.: Prentice-Hall, 1972); David E. Hunt, "Person-Environment Interaction: A Challenge Found Wanting before It Was Tried," *Review of Educational Research* 45 (Spring 1975): 209-230.

7. Peter D. Tomlinson and David E. Hunt, "The Differential Teaching Effectiveness of Three Teaching Strategies for Students of High and Low Conceptual Level," paper presented at the annual meeting of the American Educational Research Association, Minneapolis, Minn., March 1970.

8. Robert F. Peck, "Needed R and D in Teaching," *Journal of Teacher Education* 27 (Spring 1976): 19.

9. For descriptions of the most prominent of these types of approaches, see *Systems of Individualized Education*, ed. Harriet Talmage (Berkeley, Calif.: McCutchan Publishing Corp., 1975).

10. Linda Lockhart Jones, "First-day Attendance Off at Magnet Schools," *St. Louis Post-Dispatch*, September 8, 1976, 1-6E.

11. Elizabeth G. Cohen, "The Effects of Desegregation on Race Relations," *Law and Contemporary Problems* 32 (Spring 1975): 271-299.

12. *Ibid.*, 289.

13. *Ibid.*, 297.

14. Janet W. Schofield and Andrew Sagar, "Interracial Interaction in a New 'Magnet' Desegregated School," paper presented at the annual meeting of the American Psychological Association, Washington, D.C., August 1976, 5-6. See also Janet W. Schofield, "Ethnographic Study of a 'Nearly Integrated' Urban Middle School," Phase I Project Report, NIE Contract No. 400-76-0011 (Pittsburgh, Pa.: University of Pittsburgh, 1976, mimeo).

15. "Magnet Schools Short of Goals," *New York Times*, July 25, 1976, 23.

16. *Ibid.*

17. *Ibid.*

18. "Chronicle of Race, Sex, and Schools," *Integrateducation* 14 (May-June 1976): 54.

19. Quoted *ibid.* (July-August 1976): 35.

20. Personal interview, January 22, 1976.

in Levine and Havighurst, The Future of Big City Schools (1977)

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1. Desegregation and Resegregation: A Review of the Research on White Flight from Urban Areas

Robert G. Wegmann

A recent summary of research on school desegregation prepared by the National Institute of Education for the Ford administration shows that the flight of whites from American cities is different from city to city, and no one knows which governmental policies might influence or control this phenomenon.[1] Various authors have noted that the social sciences seem to offer little in the way of understanding (or controlling) the problem of resegregation, and there has been no systematic national effort to study the impact of school desegregation over a period of years.[2] In the furor over some recent statements made by James S. Coleman, little attention has been paid to one of the major points of his initial paper, namely, that the federal government has failed to attempt any serious analysis of the massive data that it routinely collects on school racial proportions.[3]

Such an analysis would be a very demanding task. The recent debate between Coleman and his critics has made clear the fact that desegregated schools exist within a multitude of contexts, and each of these contexts influences what does or does not happen in the school.[4] There is an ongoing process of suburbanization, which surely would have occurred even if there were no racial minorities but which disproportionately involves the white population. There has been a major downturn in the white birth rate that is now causing, in most school districts, a loss of white enrollment quite unconnected with desegregation. Longitudinal studies are complicated by the fact that school attendance areas and school district boundaries change over time, and comparisons with city census data can be difficult because many school systems have boundaries that are not coterminus with city boundaries. Further, there are minority groups other than blacks in most school systems. Some authors add these other minority students to the white population when analyzing white flight;[5] others do not.[6] It is important, therefore, to stress that Reynolds Farley and Alma Taeuber are quite right when they state that the available data are poor and the methodology weak in the study of white withdrawal from desegregated schooling.[7]

The purpose of this chapter is to review research that has been done on white flight, or, more accurately, on school resegregation—the phenomenon of white withdrawal (total or partial) from desegregated public schools. It is important to point out that different researchers have approached this phenomenon in quite different ways with some studies stressing factors that are totally ignored in others. The gaps and inconsistencies in the data thus far available are such that there is considerable uncertainty not only about the factors contributing to resegregation, but also about the ways in which these factors interact. It is quite possible that this summary omits or misinterprets major factors, or that further investigation will show some of these factors to be unimportant.

WITHDRAWAL FROM DESEGREGATED SCHOOLS

Two Initial Distinctions

One of the first things that becomes apparent in the study of school resegregation is the degree to which issues of race and class are consistently confounded. Blacks and most other minority groups are, of course, disproportionately poor, and the poor do not do well in school. Schools where the poor are concentrated are no more attractive to minority parents (especially middle-class minority parents) than they are to white parents. Gary Orfield notes that some ten thousand black students in Washington, D.C., are in private schools,[8] and Dennis Lord reports that the schools of Richmond, Virginia, are now experiencing "black flight" as they become increasingly black and poor and unattractive to the black middle class.[9] This same phenomenon was noted by Thomas Pettigrew in testimony before the Select Committee on Equal Educational Opportunity of the U.S. Senate.[10] What is often called white flight is actually a class as well as a racial phenomenon.

It is also useful to distinguish between withdrawal and nonentrance. The phrase "white flight" tends to suggest that white students were attending a school, the school was integrated, and then white students found this undesirable and left. Reported drops in white attendance during the "first year" of school desegregation really refer to students who never showed up at all. They did not experience desegregation and find it undesirable; rather, they declined to try the experience in the first place. Some of this decline in white enrollment may consist of students who formerly attended a given school, but chose not to return. Part may also consist of students who, in the absence of school integration, would have moved into a neighborhood, but, because of integration, decided not to make the move.

Studies of racially changing neighborhoods show that, even when there is no abnormal rate of white departure, white entrance into such neighborhoods can, and often does, drop sharply,[11] and such nonentrance can consist disproportionately of families with school-age children. Moving because of dissatisfaction with the schools can be difficult and expensive. It is easier, if one is looking for a house and hears that a desegregation decision is pending or that there are problems at the neighborhood school, to choose a different neighborhood or school district in which to purchase a home.

In addition to nonentrance into the neighborhood served by a particular set of schools (elementary and secondary), there is also the issue of nonentrance into a particular school. Schools are especially susceptible to nonentrance, not only in the sense that there are private and parochial alternatives, but also because of the transitional moves from elementary school to junior high and from junior high to senior high (each school often serving a wider attendance area and having a different reputation and racial composition). As a result, parents and students are repeatedly presented with the necessity of deciding whether or not to enter.

Thus, when one reads Orfield's report that the school system of Inglewood, California, went from about 25 percent black the year before court-ordered integration was put into effect to 35 percent the following September,[12] it is not necessary to assume that all of this loss was caused by white families who either left town or sought other schooling. Some of the loss may well have been due to white families *not* moving in on hearing of impending integration, and thus failing to replace families who, in the normal course of events, would have moved anyway. Some of what seems at first glance to be "anticipatory flight" may, in fact, be "anticipatory nonentrance." Indeed, one of the problems with allowing desegregation suits to drag on unresolved for years is precisely this: over those years the normal proportion of white families may leave the city and an abnormal proportion of white families with children may elect not to move in because they are uncertain whether a desegregation order is coming, as well as anxious about what that would mean. This could be no small factor over time in a population as mobile as that of the United States. According to recent data from the U.S. Bureau of the Census, 38.7 percent of white metropolitan residents were living in a different house in 1974 than the one in which they lived in 1970.[13]

Quality, Safety, and Status

Surprisingly, there seems to be little research available on the motives that lead parents to withdraw their children from desegregated schools. Such discussions as are found center on three areas: parental perceptions of school quality, parental perceptions of student safety in the desegregated school, and parental concerns about social status. In view of the limited data, however, any conclusions about the relative importance of these concerns (or about their actual impact on the decision to withdraw from a desegregated school) must remain tentative.

Neil Sullivan, the superintendent who presided over the desegregation of the Berkeley, California, public schools, describes the main fears of white parents when school desegregation is proposed as fear for their children's safety and fear that educational quality will suffer.[14] Such fears may be exacerbated when students are assigned to schools located in inner-city areas; Lord cites some very high rates of decline in student enrollment under such circumstances.[15]

Concerns about educational quality seem widespread. Orfield cites a national poll showing that a fourth of the public believes that the test scores of white students decline sharply in desegregated schools.[16] Although it is generally *not* the case that such declines in white achievement actually occur, the quality of research in this area leaves much to be desired.[17] Traditional reporting practices in school districts can cause problems. If, for example, lower-achieving minority students from an inner-city area of a major city are mixed with higher-achieving white students from an affluent area, the mean test scores of the formerly high-status school can be expected to go down, even though the more affluent students are doing as well as always and the minority students are doing better than before. Depending on how data are released to the public, quite different impressions can be created.[18]

Many characteristics of inner-city life do militate against success in the bookish atmosphere of the school. Frank Petroni, Ernest Hirsch, and Lillian Petroni describe minority students taking their schoolwork seriously in the face of criticism by fellow students who see preparing for college as "white" behavior.[19] Bioloine Young and Grace Bress cite a *Wall Street Journal* interview indicating that pressure not to study is placed on some minority students by their peers.[20] It would be easy to point out that some white students apply similar pressure on their peers, but it is not that simple. In a 1968 study based on a random sample of 2,625 Baltimore students in grades three to twelve, selected from twenty-six schools, Morris Rosenberg and Roberta Simmons found that school grades seemed to have little impact on the self-esteem of black children, especially those doing poorly in school.[21] Life in the inner-city ghetto generates attitudes, values, and behaviors quite different from those found in more affluent areas. Parents (especially middle-class parents, white or black), who fear these attitudes and have the means to flee them are often inclined to do so lest their children be influenced by them.

The probability that white withdrawal from desegregated schools, when it occurs, need not be attributed to racism per se is strengthened by the fact that the literature shows many white parents voluntarily participating in school integration programs when they were convinced that their children were safe and that the educational quality of the schools was good. In many large cities parochial schools are located in older areas of town, and, although they have a significant minority representation in their student bodies, white, middle-class parents voluntarily pay tuition, and students travel from suburban, outer-city areas to attend them. In Boston, despite the furor over school desegregation, the Trotter School, which is a part of the city's public school system, has operated since the fall of 1969 with an equal ratio of black and white students.[22] The school has a new, expensive plant with modified open classroom instruction, learning centers, and other educational advantages not ordinarily available, and white students are easily recruited. According to press reports, the town of Richardson, a suburb of Dallas, Texas, avoided a court order to desegregate by attracting a sufficient number of whites to a previously all-black school. There is a pupil-teacher ratio of sixteen to one; 80 percent of the faculty have master's degrees; and the extensive curriculum includes arts and crafts, foreign languages, drama, music, gymnastics, and astronomy. More white students applied than could be accommodated. Although open enrollment is usually considered an ineffective tool for large-scale integration, John McAdams has surveyed an impressive list of schools that successfully convinced students to transfer voluntarily when the quality of integrated education was clearly high.[23]

Parental perception of student safety may also be involved in decisions to reject desegregated schooling. Leslie Bobbitt describes the differing perceptions that black and white students bring to the desegregated school.[24] There are often different behavior patterns and ways of handling conflict and hostility. Rumors may fly as latent parental fears are triggered by incidents that would otherwise be ignored. In some cases, of course, inner-city schools in major cities are *not* safe, and physical attacks, shakedowns, and threats do occur. Gretchen Schafft describes the fear of going to the bathroom held by white students in one predominantly black elementary school, and the degree to which white students avoided out-of-school activities.[25] What really seems to be involved in some of these situations is the fact that, although they are desegregated, these schools are not truly integrated. Although black and white students are physically present in the same school, the degree of friendship, understanding, and community is quite low.

Finally, just as some individuals do not wish to live in a neighborhood with members of a group whose social status they view as being beneath their own,[26] some parents who do not have specific concerns about educational quality or safety, as such, may still object to having their children attend school with students from a lower social class. As Micheal Giles, Douglas Gatlin, and Everett Cataldo point out,[27] desegregation often results in not only an influx of black children into the white child's environment, but also an influx of lower-class children into a middle-class environment. Among parents with a high income and education, these authors found class prejudice (as opposed to racial prejudice) significantly related to protest behavior, such as attending school board meetings, writing letters, or phoning the school board to protest school desegregation. Another excellent description of how different social classes react to desegregation proposals is provided in Lillian Rubin's account of the polarization of the Richmond, California, Unified School District.[28] These reactions illustrate again how the whole issue of school resegregation is as much a matter of class conflict as of racial conflict.

Parental concerns about educational quality, safety, and status may be present no matter how the desegregated situation comes about. There is evidence to suggest, however, that the likelihood of a school resegregating, and the process by which this may occur, will differ considerably depending on whether the racial balance in the school reflects the neighborhood served by the school or whether some level of government has intervened to bring about school desegregation quite apart from the situation in the surrounding neighborhood.

NEIGHBORHOODS AND SCHOOLS IN RACIAL TRANSITION

School desegregation situations may be divided into two broad classes: those that occur without government intervention and reflect neighborhood integration in the attendance district served by the school; and those that occur because either the courts, the local school board, or the executive branch of the state or federal government has intervened to desegregate previously segregated schools. It is impossible to study the first type of desegregated (and often resegregating) schools without also studying the process of racial change within the school attendance area. To do otherwise would be to study them in a demographic vacuum, a charge recently leveled against Coleman.[29]

Atlanta, for example, has been judicially cited as having so much white flight from its public school system that further attempts at integration would be futile.[30] The school system, which originally had a majority of white students, had changed by 1970 to a majority (69 percent) of black students. The minority population of the city as a whole, however, was also changing from 38 percent minority in 1960 to 52 percent minority in 1970.[31] Therefore the change in the racial makeup of Atlanta's schools took place within the context of a general change in the racial makeup of the entire city. Atlanta, for example, now has a black mayor. Indeed, all of Coleman's findings, as initially presented,[32] must be considered to have occurred within the context of the changing neighborhoods of large central cities. A check by the *New York Times* revealed that there was no court-ordered busing or redistricting in any of the nineteen cities Coleman studied.[33]

This is not to suggest, however, that these changes are not of great significance. According to the U.S. Commission on Civil Rights, enrollment in the hundred largest school districts, which have half of the nation's black pupils, dropped by 280,000 students between 1970 and 1972.[34] Since there was a gain of 146,000 black students during this same period, the data suggest a very considerable loss of white students. Although some of this loss can be attributed to a drop in the white birth rate and other factors, it is clear that a larger proportion of white families with children than of white families without children are likely to live in suburban areas. According to the Bureau of Census, 60.1 percent of the white population of metropolitan areas that is eighteen years of age or over lived in the suburbs in 1974, while 66.6 percent of school-age whites five to seventeen years old were to be found in the suburbs.[35] Again, this need not be totally attributed to problems with schools; suburbanization would no doubt have occurred even if there were no racial minorities in the United States,[36] and suburbs would no doubt have attracted families with school-age children under any conditions. The data suggest, however, that schools are involved.[37]

The most obvious fact about the neighborhood context of school racial proportions is the high degree of residential segregation that characterizes every city in the United States.[38] There are few stable interracial neighborhoods in American cities, and those are generally found only when the black population of the city as a whole is stable (which, owing to natural increase and in-migration, has *not* generally been typical of American cities).[39] Some segregation is due, of course, to differences in income level. Albert Hermalin and Reynolds Farley, however, present rather convincing arguments that economic factors do not account for much of the concentration of blacks in the central city.[40] According to the Census Bureau,[41] blacks constituted only 5 percent of suburban populations in both 1970 and 1974, despite the fact that a majority of metropolitan residents now live in suburbs rather than in the central city. A more reasonable explanation may lie in the division of central cities into black and white housing markets, as Harvey Molotch suggests.[42] This seems to be a structure that is not easily avoided. In a critical review of evidence presented to the court in the Detroit school desegregaton case, Eleanor Wolf cites moving testimony by several black real estate brokers who spoke of the rebuffs, subterfuge, and humiliation they endured in attempting to secure listings in white areas.[43]

Thus, while it is important to understand how the process of school and neighborhood resegregation proceeds, it is necessary to point out one inescapable fact: given constant density, a growing minority population that stays within the central city combined with a white population free to move out of the central city will inevitably produce an increasing number of segregated neighborhoods and segregated schools.[44] As Arthur Stinchcombe, Mary McDill, and Dollie Walker note from studying this phenomenon in Baltimore, the city simply runs out of whites with whom blacks can integrate.[45]

It is on the fringes of the black ghetto that interracial neighborhoods are commonly found.[46] What is striking as one reviews studies of the process of racial transition in these areas is the degree to which white *nonentrance* is much more involved than white flight as such. This is not to deny that some individuals do move from racially changing neighborhoods specifically to avoid an interracial setting. The fundamental pattern, however, seems to be one of blacks moving short distances into racially mixed neighborhoods where whites fail to compete with them for the available housing. In a study of Milwaukee, Harold Rose found that only 4 percent of a sample of Negroes who moved selected new homes more than ten blocks beyond the original ghetto neighborhood.[47] At the same time he found that, when the neighborhood exceeded 30 percent Negro occupancy, the number of new white purchasers of housing fell off sharply. He also cited other data indicating this as a common pattern: neighborhood change, he argued, is less a matter of invasion than of retreat. In a review of the literature on ecological succession, Howard Aldrich also reported no particular rise in the rate of residential mobility in changing neighborhoods.[48] What is important is that no rise is necessary to cause rapid racial transition. Normal mobility, as has been noted, makes a great deal of housing available throughout the metropolitan area. So long as blacks seek to occupy housing on the fringes of the ghetto while whites avoid it, racial change is inevitable. Chester Rapkin and William Grigsby, who studied the Philadelphia area, found this sharp drop in white demand, as did Molotch, who studied the South Shore area of Chicago.[49] Indeed, Molotch found many landlords who did not want black occupants, but there was no other choice because whites were not interested. Such neighborhoods then go through a transition from a white to a black housing market.

Anticipation of Future Racial Change

One key factor in considering the reluctance of whites to purchase homes in racially mixed neighborhoods is the degree to which present racial proportions are projected into the future by potential entrants. It may or may not be significant to discuss the racial balance at which both whites and blacks feel there is "enough" integration,[50] but what is really crucial to most home buyers (and parents enrolling their children in school) is their view of what is likely to happen in the future. The purchase of a home, once again, is a significant commitment. Most parents prefer to leave their children in the same school for a period of years. In any major city with a large minority population, where area after area and school after school has "turned," there is an obvious tendency to assume that a school or area with any degree of minority population will be "next to go," especially if the area is physically close to the ghetto. Wolf reports such a reaction in the Russel Woods area of Detroit after only one or two black families moved in.[51] The white demand for housing dropped markedly. In some situations a drop in white enrollment that occurs before school desegregation actually begins may be caused by the belief that the schools will soon be largely black. Surely the striking white loss in the Inglewood, California, school system has some relation to Inglewood's location. It borders on the Los Angeles ghetto, and there was significant black movement into Inglewood well before court-ordered desegregation began.[52]

In areas where black and white residents are working to maintain an interracial neighborhood, their most difficult struggle is often to attract new white residents.[53] The frequent temptation is to work on more easily obtainable goals, such as increased city services and other neighborhood improvements. As Molotch suggests, however, this can be self-defeating since such actions make the area that much more attractive to prospective black entrants but often fail to alleviate the fears of potential white entrants.[54] Despite years of intense effort, Molotch found that such activities made little impact on the degree of racial change experienced in the South Shore area of Chicago.

The School and Neighborhood Change

The research on just what role schools play in the process of neighborhood change is sketchy but suggestive. A study made in Milwaukee shows that in interracial neighborhoods the proportion of black students in the school is consistently higher than the proportion of black residents in the neighborhood served by the school.[55] And schools, like double beds, enforce a certain intimacy. One can ignore a neighbor down the street;[56] it is harder to ignore someone sitting next to you in the classroom. The school, moreover, is a social institution that serves as the central focal point for much community interaction, just as social relationships formed in school are carried back to the neighborhood.[57]

Parents, students, and schools may or may not be ready for such interaction. To the extent that the school is unprepared and fearful of racial change, it can become a focus of discontent. And the schools are, indeed, often unprepared for, and fearful of, racial change. A study of riots and disruptions in public schools indicates that such disruptions are most likely to occur in a school where the minority population is from 6 percent to 25 percent of the total enrollment and the faculty is not integrated—precisely the situation found in most urban schools as the neighborhoods they serve begin the process of racial transition.[58]

Because of these problems, most studies of changing neighborhoods emphasize that parents with children they intend to enroll in public schools are particularly reluctant to purchase a home in such neighborhoods. Eleanor Wolf and Charles Lebeaux note that the typical middle-class neighborhood undergoing racial change will retain users of parochial schools and older people without children, but not those intending to use the public schools.[59] When Washington, D.C., desegregated its schools, real estate brokers were constantly telephoning the school board to find out which school would serve a given neighborhood.[60] In a study of Baltimore and Atlanta, Charles Clotfelter found that school desegregation led to a decrease in white families living in racially mixed neighborhoods. He estimated a loss of from 2 to 3 percent of whites under fourteen in such areas for every decrease of 10 percent in the proportion of white students within the neighborhood school.[61] Chester Rapkin and William Grigsby found that white purchasers in racially mixed areas in Philadelphia were disproportionately Catholic, that there were numerous parochial schools in the area, and that few blacks were Catholic.[62] It seems reasonable to conclude, at least tentatively, that the reluctance of whites to purchase homes in racially mixed neighborhoods is increased by the presence of desegregated schools with which potential entrants may have had no previous experience (and which they may expect will resegregate). Such behavior, of course, acts as a self-fulfilling prophecy.

A number of researchers have noted that the presence of rental units tends to retard racial transition.[63] For one thing, many rental units will not admit families with children.[64] Because such policies keep black (and white) children out of the public schools in these areas, and bring in whites who are neither affected by what is happening in the schools nor called upon to make the degree of commitment involved in buying a house, they retard neighborhood racial transition. Clotfelter's study of Atlanta indicated that mere proximity to a black neighborhood lowered housing prices, but increased the amount of rent charged tenants.[65] He also found that housing prices fell in tracts where high schools experience greater desegregation. Thus, school and neighborhood have a reciprocal relationship, with the school seemingly more sensitive to racial transition.[66] To consider what is happening to the racial makeup of the urban school, outside the context of the racial makeup of its attendance area and the changing racial proportions of the entire school district, is to risk serious misunderstanding.

It is in this framework that any consideration of the "tipping point" controversy might most profitably take place. Various authors, including myself, have referred to a point where white departures accelerate or at least become irreversible, leading shortly to a neighborhood or school becoming all black.[67] Wolf has pointed out that this concept was accepted without challenge in the Detroit desegregation case, and references to it can be found in other court cases.[68] As we shall see, however, while there are occasional surges of white departure in individual schools in changing neighborhoods, the more general phenomenon seems to be a relatively constant pattern of black entrance combined with white departure or nonentrance.[69] Schools do not "tip" by themselves. They resegregate because there is a growing black population being steered by a dual housing market to transitional neighborhoods that white buyers are avoiding because they anticipate that the neighborhoods and the schools that serve them will shortly be resegregating. The schools that are desegregated outside the context of the changing neighborhood are, however, an entirely different case, with their own dynamics. These will be explored later in this chapter. Thus it now seems to me that "tipping" is not a particularly useful concept to use in describing the changing racial proportions of schools, whether or not they are neighborhood schools, because it ignores the contexts within which resegregation takes place and tends to imply that there is no such thing as stable integration—which is not true.

How the process of racial transition proceeds in individual schools located in changing neighborhoods can be seen in Table 1-1, which shows the effect on enrollment in eighteen Milwaukee elementary schools. Each of the schools either (a) had between 20 and 80 percent minority enrollment in the fall of 1969 or, (b) although below 20 percent minority enrollment in 1969, had reached at least 30 percent minority enrollment by the fall of 1975 and was predominantly black in its minority composition. The latter requirement led to the omission of four schools that were predominantly Hispanic.[70] The table is arranged so that year-to-year changes in minority and white (other) enrollment are shown for each year, as well as the year-to-year change in total enrollment. Enrollments affected by boundary or grade-level changes are also noted.

An examination of the pattern of change in these eighteen elementary schools reveals occasional surges of white outflow.[71] The overall pattern, however, is one of relatively steady, seemingly inexorable change. Throughout these years, while the white enrollment of the Milwaukee public school system was declining, the black enrollment was growing.[72] Since the system was in no way intervening to bring racial stability to these or any other schools, it was these schools, located generally around the outer edges of the black ghetto, into which the growing black population moved and from which the shrinking white population withdrew.[73]

Table ' :

Enrollment in eighteen Milwaukee public elementary schools undergoing racial transition, 1968 1975

Year	Clarke St.[a]								Clemens								Congress							
	Minority			White			Total		Minority			White			Total		Minority			White			Total	
	No.	%	Change	No.	%	Change	No.	Change	No.	%	Change	No.	%	Change	No.	Change	No.	%	Change	No.	%	Change	No.	Change
1968	409	52	–	385	48	--	794	–	39	15	--	216	85	--	255	--	50	8	--	609	92	--	659	--
1969	571	64	162	318	36	-67	889	95	41	17	2	200	83	-16	241	-14	58	9	8	561	91	-48	619	-40
1970	528	71	-43	213	29	-105	741	-148	32	14	-9	189	86	-11	221	-20	65	11	7	530	89	-31	595	-24
1971	546	83	18	112	17	-101	658	83	64	30	32	148	70	-41	212	-9	73	13	8	511	88	-19	584	-11
1972	886	87	340	130	13	18	1,016	358	77	36	13	139	64	-9	216	4	89	16	16	451	84	-60	540	-44
1973	871	93	-15	69	7	-61	940	-76	122	51	45	116	49	23	238	22	108	21	19	405	79	-46	513	-27
1974	901	95	30	51	5	-18	952	12	140	59	18	96	41	-20	236	-2	128	26	20	363	74	-42	491	-22
1975	896	96	-5	40	4	-11	936	-16	143	62	3	89	38	-7	232	-4	154	31	26	344	69	-19	498	7

Year	Elm								Fratney								Garden Homes							
	Minority			White			Total		Minority			White			Total		Minority			White			Total	
	No.	%	Change	No.	%	Change	No.	Change	No.	%	Change	No.	%	Change	No.	Change	No.	%	Change	No.	%	Change	No.	Change
1968	369	58	–	262	42	–	631	–	31	6	–	524	94	–	555	–	405	64	–	229	36	–	634	–
1969	404	71	35	163	29	-99	567	-64	59	10	28	512	90	-12	571	16	492	78	87	136	22	-93	628	-6
1970	460	71	56	192	29	29	652	85	85	15	26	468	85	-44	553	-18	669	85	177	119	15	-17	788	160
1971	487	78	27	136	22	-56	623	-29	131	24	46	413	76	-55	544	-9	634	87	-35	91	13	-28	725	-63
1972	494	87	7	74	13	-62	568	-55	166	32	35	356	68	-57	522	-22	674	95	40	37	5	-54	711	-14
1973	488	87	-6	76	13	2	564	- 4	212	38	46	340	62	-16	552	30	753	98	79	18	2	-19	771	60
1974	457	90	-31	50	10	-26	507	-57	287	53	75	256	47	-84	543	-9	767	99	14	9	1	-9	776	5
1975	443	91	-14	45	9	-5	488	-19	240	52	-47	221	48	-35	461	-82	742	99	-25	8	1	-1	750	-26

Table 1-1 (continued)

Year	35th Street							31st Street							Townsend[b]						
	Minority			White			Total		Minority			White			Total		Minority			White			Total	
	No.	%	Change	No.	%	Change	No.	Change	No.	%	Change	No.	%	Change	No.	Change	No.	%	Change	No.	%	Change	No.	Change
1968	32	7	–	400	93	–	432	–	121	14	–	733	86	–	854	–	74	12	–	549	88	–	623	–
1969	31	8	-1	369	92	-31	400	-32	184	22	63	643	78	-90	827	-27	82	13	9	558	87	9	640	17
1970	34	8	3	393	92	24	427	27	174	24	-10	547	76	-96	721	-106	111	18	29	498	82	-60	609	-31
1971	46	12	12	345	88	-48	391	-36	241	34	67	467	66	-80	708	-13	189	30	78	441	70	-57	630	21
1972	72	20	26	296	80	-49	368	-23	283	43	42	375	57	-92	658	-50	231	44	42	294	56	-147	525	-105
1973	118	30	46	271	70	-25	389	21	359	56	76	278	44	-97	637	-21	310	59	79	214	41	-80	524	-1
1974	135	36	17	242	64	-29	377	-12	427	66	68	220	34	-58	647	10	353	69	43	159	31	-55	512	-12
1975	128	37	-7	219	63	-23	347	-30	413	70	-14	176	30	-44	589	-58	391	76	38	122	24	-37	513	1

Year	24th Street							27th Street							Wisconsin						
	Minority			White			Total		Minority			White			Total		Minority			White			Total	
	No.	%	Change	No.	%	Change	No.	Change	No.	%	Change	No.	%	Change	No.	Change	No.	%	Change	No.	%	Change	No.	Change
1968	46	8	–	557	92	–	603	–	279	32	–	581	68	–	860	–	236	33	–	482	67	–	718	–
1969	78	12	32	563	88	6	641	38	300	38	21	500	63	-81	800	-60	213	33	-23	437	67	-45	650	-68
1970	71	11	-7	570	89	7	641	0	334	40	34	495	60	-5	829	29	182	31	-31	409	69	-28	591	-59
1971	137	23	66	464	77	-106	601	-40	368	47	34	415	53	-80	783	-46	196	33	14	405	67	-4	601	10
1972	171	32	34	365	68	-99	536	-65	406	53	38	360	47	-55	766	-17	218	39	22	334	61	-71	552	-49
1973	197	41	26	281	59	-84	478	-58	436	58	30	314	42	-46	750	-16	205	43	-13	269	57	-65	474	-78
1974	227	52	30	213	48	-68	440	-38	420	67	-16	211	33	-103	631	-119	260	55	55	217	45	-52	477	3
1975	284	59	57	194	41	-19	478	38	432	70	12	187	30	-24	619	-12	271	52	11	250	48	33	521	44

[a] An annex to Clark Street School was opened in 1972, changing the attendance pattern.
[b] Transfers to Silver Spring and to Townsend from outside their attendance areas were halted in 1975 to prevent further racial imbalance

Understanding changes in the racial composition of secondary schools serving racially mixed attendance areas is somewhat complicated by the fact that open enrollment is extensively used at this level, with many students leaving their home neighborhoods to attend schools more attractive to them.[74] Table 1-2 illustrates the impact of open enrollment. Most elementary children who participate in open enrollment travel only short distances.[75] Thus these moves generally have relatively little racial impact, as Table 1-2 illustrates.

The moves made by secondary students, on the other hand, have strong racial impact. Actually there are two effects, heading in somewhat opposite directions. Minority students leave heavily minority schools and attend more racially balanced schools; white students also leave heavily minority schools in large numbers for schools with a higher proportion of white students.[76] Thus schools like Wright Junior High (located along a convenient bus line) and Riverside High (located east of the black inner city) receive substantial numbers of transfers. In the case of Riverside, there were so many black transfers that the school board froze further transfers, fearing the school would become all black.

Table 1-3 provides information on secondary schools similar to that provided on elementary schools in Table 1-1. Here, too, despite the complications of open enrollment and disproportionate minority dropout in the higher grades, the overall pattern is one of steady white withdrawal (or nonentrance), and partial black replacement. In these schools, as in the system as a whole, the level of downturn in white enrollment is greater than the increase in minority enrollment; hence, total enrollment is generally decreasing.

Social-Class Levels and Neighborhood Change

One additional variable that may be closely related to white flight is the social-class level of the white population in the changing neighborhood. In her study of the Russel Woods section of Detroit, Wolf reports that the moving order of white households was markedly affected by family income, with the more prosperous families moving first. Racial attitudes were irrelevant.[77] According to the Bureau of the Census, whites moving from the central city to suburbs in the same metropolitan area had average incomes of $15,532; whites moving from one part of the city to another had an average income of $12,362.[78] Indeed, it can be observed that the disorders that have

Table 1-2

Number and percentage of student transfers in Milwaukee public schools

Ethnic category	School level	Transfer from schools					Transfer to schools				
		High in minority enrollment		Low in minority enrollment			High in minority enrollment		Low in minority enrollment		
		Number	Percent	Number	Percent	Total	Number	Percent	Number	Percent	Total
Minority	Elementary	1,246	84	243	16	1,489	1,337	76	424	24	1,761
White (other)		415	25	1,239	75	1,654	226	12	1,672	88	1,898
Minority	Junior high	822	86	133	14	955	377	29	912	71	1,289
White (other)		286	34	557	66	813	5	1	821	99	826
Minority	Senior high	1,455	90	166	10	1,621	977	63	598	37	1,595
White (other)		893	32	1,865	68	2,758	100	3	2,820	97	2,920

Source: Adapted from Dwight Rowe, "Educational Outcomes Associated with Ethnic Changes in School Populations," paper presented at the annual meeting of the American Educational Research Association, Washington, D.C., 1975, pages 17-18. Note that the totals of transfers from schools do not match the totals of transfers to schools. The data were taken from computerized records as of March 3, 1975. Because some schools were quicker and more accurate than others in reporting transfers, the data are to some extent incomplete and inconsistent. Schools of high-minority enrollment are defined as those with 50 percent or more minority students. Low-minority enrollment is defined as less than 50 percent minority students. Perhaps as many as seven hundred of the secondary transfers were to Milwaukee Trade and Technical School, a special, nondistrict school with low-minority enrollment. Only open enrollment within the Milwaukee school system is included in these figures. New students from outside the system registering at their district school are not included; nor are students leaving the public school system altogether.

Table 15

Enrollment in Milwaukee public junior and senior high schools undergoing racial transition, 1968–1975

Year	Edison Junior High [a]								Peckham Junior High [b]								Wright Junior High							
	Minority			White			Total		Minority			White			Total		Minority			White			Total	
	No.	%	Change	No.	%	Change	No.	Change	No.	%	Change	No.	%	Change	No.	Change	No.	%	Change	No.	%	Change	No.	Change
1968	117	9	--	1,224	91	--	1,341	--	429	38	--	687	62	--	1,116	--	240	21	--	898	79	--	1,138	--
1969	153	11	36	1,198	89	-26	1,351	10	664	54	235	571	46	-116	1,235	-119	226	21	-14	875	79	-23	1,101	-37
1970	160	10	7	1,379	90	181	1,539	188	830	72	166	324	28	-247	1,154	-81	175	17	-51	842	83	-33	1,017	-84
1971	189	12	29	1,330	88	-49	1,519	-20	696	88	-134	92	12	-232	788	-366	192	18	17	866	82	24	1,058	41
1972	300	22	111	1,049	78	-281	1,349	-170	776	97	80	23	3	-69	799	11	223	21	31	836	79	-30	1,059	1
1973	525	38	225	852	62	-197	1,377	28	617	99	-159	8	1	-15	625	-174	261	25	38	772	75	-64	1,033	-26
1974	560	44	35	715	56	-137	1,275	-102	724	97	107	22	3	14	746	121	257	27	-4	678	73	-94	935	-98
1975	582	49	22	608	51	-107	1,190	-85	649	98	-75	15	2	-7	664	-82	238	29	-19	570	71	-108	808	-127

Year	Steuben Junior High [a, c]								Riverside Senior High [a]								Washington Senior High [a, d]							
	Minority			White			Total		Minority			White			Total		Minority			White			Total	
	No.	%	Change	No.	%	Change	No.	Change	No.	%	Change	No.	%	Change	No.	Change	No.	%	Change	No.	%	Change	No.	Change
1968	60	5	--	1,197	95	--	1,257	--	564	30	--	1,302	70	--	1,866	--	224	8	--	2,644	92	--	2,868	--
1969	100	7	40	1,249	93	52	1,349	92	649	35	85	1,182	65	-120	1,831	-35	378	14	154	2,379	86	-265	2,757	-111
1970	105	8	5	1,261	92	12	1,366	17	663	39	14	1,046	61	-136	1,709	-122	536	21	158	1,979	79	-400	2,515	-242
1971	167	13	62	1,100	87	-161	1,267	-99	728	44	65	943	56	-103	1,671	-38	903	32	367	1,885	68	-94	2,788	273
1972	185	15	18	1,023	85	-77	1,208	-59	827	51	99	785	49	-158	1,612	-59	1,012	41	109	1,437	59	-448	2,449	-339
1973	349	33	164	693	67	-330	1,042	-166	917	60	90	613	40	-172	1,530	-82	1,256	48	244	1,339	52	-98	2,595	146
1974	389	48	40	424	52	-269	813	-229	705	60	-212	464	40	-149	1,169	-361	1,645	56	389	1,294	44	-45	2,939	344
1975	352	47	-37	403	53	-21	755	-58	622	57	-83	467	43	3	1,089	-80	1,695	63	50	1,014	37	-280	2,709	-230

[a] Transfers to Riverside (1974) and to Steuben, Edison, and Washington (1975) from outside their attendance areas were halted to prevent further racial imbalance

[b] The attendance pattern of Peckham was changed in 1974 when Grade 9 was assigned to Washington

[c] Grade 9 was assigned to Washington in 1974

[d] Washington changed from a three-year school (Grades 10-12) to a four-year school (Grades 9-12) in 1974

sometimes accompanied court-ordered busing seem to be concentrated in working-class and lower-class areas, perhaps because the people in these areas, unlike the middle class, cannot easily afford to move.

As a check to see whether the Milwaukee experience was influenced by white social-class level, the eighteen elementary schools that appear in Table 1-1 were divided into two groups. One group of nine schools served attendance areas where mean annual income, based on 1970 census data, was estimated to be below $10,000. The other group of nine schools served areas where the estimated mean family income was above $10,000. The average decrease in percentage of white attendance at the poorer schools (1968-1975) was 31.9 percentage points. In the wealthier areas, it was 46.4 percentage points.[79] Taeuber and Taeuber found that "invading" blacks are often of higher socioeconomic status than the white residents they replace, and the whites leaving tend to be of higher socioeconomic status than those left behind.[80] Perhaps, then, the wealthier areas of Milwaukee were more attractive to upwardly mobile blacks seeking better homes and schools and were also inhabited by whites more able to move if threatened by racial change in their schools and neighborhoods.

Taken as a whole, the research indicates rather strongly that, so long as in-migration and natural increase provide a growing minority population, it is most unlikely that the process of school "desegregation" in changing neighborhoods around the fringes of the inner city will be anything but a temporary situation between the time when a school is largely white and a time when it is largely black. Without government intervention to provide a stable level of integration in the schools, and simultaneously to provide adequate, safe, and desirable living opportunities for minority citizens in areas other than those immediately surrounding the inner city, the process of resegregation cannot but continue. In some cases, such as Inglewood, this process has passed the boundary of the central city and is continuing on into the suburbs.

SCHOOL DESEGREGATION BY GOVERNMENTAL ACTION

The second broad category of school desegregation situation occurs when either the courts, or the local school board, or the executive branch of the federal or state government intervenes to bring about the desegregation of previously segregated schools. In the South, this has occasionally meant changing from a dual to a unitary, but still neighborhood, school system, particularly in small towns. In most southern towns of any size, however, as in most northern areas, segregated neighborhoods are large enough so that students must be transported if school desegregation is to be accomplished.

White flight may or may not occur in such situations.[81] White Plains, New York, began busing students to desegregate its schools in 1964, and there was a six-year follow-up study in 1970. White students were doing as well or better academically than before integration, black students were doing better, and there had been no white flight.[82] Pasadena, California, on the other hand, recently completed a four-year follow-up study of their experience with school desegregation. There was a significant drop in the achievement levels of students throughout the district, and white enrollment declined precipitously, from 18,000 in 1969 to 11,000 in 1973.[83] While much of this wide variation in the consequences of school desegregation may be attributable to the particular characteristics of individual cities and school districts, as well as to the differences in methods of collecting data and in interpretations of the data, there are some general patterns.

School Racial Proportion and Minority Social Class

A review of the research on white enrollment loss following school desegregation brought about through government intervention suggests that, when it occurs, the two most important factors may be the proportion of minority students involved in desegregation and their social class. Studies dating back to the period immediately after the *Brown* decision in 1954 indicate that resistance to desegregation is closely related to the proportion of black students in the schools.[84] Just as resistance to school desegregation seems to mount as the proportion of black students increases, so apparently does the likelihood of some white withdrawal. James Bosco and Stanley Robin report an additional decline of less than 1 percent in white enrollment after busing began in the Kalamazoo, Michigan, school system, where the enrollment was 18 percent black, but there was an additional decline of 4.7 percent in the white enrollment in the Pontiac, Michigan, school system, where the enrollment was 38 percent black.[85] Clotfelter found a similar relationship between proportion of black students and white flight in Mississippi, with particularly heavy flight from schools where there was a majority of black students.[86] Lord mentions a situation in

Nashville in which the number of whites in one school declined from 560 to 268 when students were bused to an inner-city school that had a black enrollment of 40 percent: the white decline in a similar school was only 15 percent when students were to be bused to a school where the black enrollment was only 20 percent.[87] (One additional factor must, however, be noted: the former students were to be bused throughout the high school years, while the latter were to be bused only for one year.) In a major research project undertaken in Florida by Micheal Giles and others, white withdrawal to private schools increased when the proportion of black students passed a 30 percent "threshold." There was also a close connection to white family income.[88]

The impact on white withdrawal of the proportion of black students may come as much from the difference in social-class level between the black and white students as from the proportion itself. Memphis, Tennessee, and Jackson, Mississippi, for instance, are often cited as particularly striking examples of white withdrawal from desegregated schooling. Farley reports that shortly after the busing order, white enrollment in the public schools of Memphis fell by twenty thousand while the number in private schools rose by fourteen thousand.[89] The *New York Times* reported that Memphis lost 46 percent of its white public school students between 1970 and 1973.[90] Indeed, Thomas Pettigrew and Robert Green argue that Coleman's conclusions on white flight would not have come out as they did were it not for the atypical results from Memphis (and from Atlanta, which has already been discussed).[91] What is striking about white withdrawal from public schools in Memphis is that it occurred in a situation where the black school population was both large (54 percent in 1968) and unusually poor. According to 1970 census data, 35.7 percent of black families in Memphis were below the poverty line, compared with 5.7 percent of nonblack families.[92] Owen Thornberry reported that one estimate showed Memphis ranking second among major cities of the nation in poverty, with 80 percent of this poverty in the black ghetto.[93]

A similar example of a large and markedly poor black population leading to white withdrawal can be found in Jackson. Egerton reported that the Jackson school system, which was 55 percent white before midyear desegregation, lost nine thousand whites and dropped to 40 percent white upon desegregation and to 36 percent white the following year.[94] According to *Time,* half of all white pupils in Jackson now attend private schools.[95] The combination of a high proportion of black students and extreme poverty is as striking in Jackson as it is in Memphis. According to recent census data, 27.3 percent of blacks in Jackson are high school graduates, compared to 77.5 percent of nonblacks and 40.3 percent of the black families are below the poverty line compared to 6.3 percent of nonblack families.[96] The median annual income of black families in Jackson in 1970 was $4,546. Richard Morrill cites Jackson as having the lowest proportion of median black family income to median white family income in the country.[97]

Thus, rightly or wrongly, parents seem to perceive a desegregated school as undesirable if it is both heavily minority and poor. Unless there is strong evidence to the contrary, white or middle-class withdrawal may follow as a result of such perceptions. Conversely, it should not be surprising that no white withdrawal is reported in Howard Ravis's account of a community with a 20 percent black population and lacking extremes of wealth or poverty. Here the school system combined integration with some educational improvements and made a smooth and successful transition to integrated schools.[98]

Social Class of White Students

Just as the social-class level of minority students involved in school integration may be important in determining whether there is racial instability, so may the social-class level of the white students. This may be true partly because of the class prejudices and values already discussed, and also partly because wealthier parents are more able to bear whatever costs might be involved in avoiding desegregated educational settings, whether these be the costs of moving or of private schooling.

Most reports on the use of private schooling deal with the South. A *Time* article has noted that half of the white pupils of Jackson, Mississippi, attend private schools, compared with a sixth of the white children of Charlotte, North Carolina. Private school attendance is also heavy in Memphis.[99] Family income seems to be a key factor in this use of private schooling. Lord, in a study of white flight to private schooling in the Charlotte-Mecklenburg school district, found that income alone explained 54 percent of the variation in the rate of white abandonment of the public schools after integration. He reports that thirteen new private schools have opened there since the 1969 desegregation order.[100] In their careful study of parents who withdrew their children from public schooling in Florida after school desegregation. Everett Cataldo and his associates found that rejection rates for white students assigned to schools with an enrollment that was more than 30 percent black were 4 percent for low-income students, 7 percent for middle-income students, and 17 percent for high-income students.[101] It is important to note that, while such losses may not represent a very high percentage of the public school population (3.6 percent overall), they do deprive the public schools of a disproportionate number of students from the more affluent part of the community.

The data would suggest, then, that several variables may be significantly related to whether or how much white withdrawal might be expected if there is governmental intervention to desegregate formerly segregated public schools. These variables would include the proportion and social-class level of minority students, the social-class level of white students, and the cost and availability of alternative schooling.

A NATIONAL SURVEY

How common is school racial instability nationally? This is a difficult question to answer. Because of boundary changes, grade-level changes, and student assignment changes associated with opening new buildings, only someone fully acquainted with the schools in a given district can really tell if a particular school is actually the "same" school from one year to the next. As a result, most research reports deal with either case studies of the schools in one locality, or national data by district rather than by individual school.

Despite the difficulties involved, however, there is really no way to understand what is happening in a school district without looking at what is happening in individual schools. It is at the level of the individual school that desegregation affects a given youngster, black or white. That is why it seems worth the effort, despite the problems, to attempt a national investigation of school racial stability (and instability).

In 1968 the U.S. Department of Health, Education, and Welfare conducted a survey of the racial proportions in all school districts in the United States with 3,000 or more students, with a sampling of districts with fewer than 3,000 students.[102] This material was published in 1970 and listed, district by district and school by school, the racial breakdowns of an estimated 43.9 percent of the nation's school districts enrolling an estimated 90.8 percent of elementary and secondary school students.[103] The result was a large volume containing some 1,700 pages of fine print. By taking every tenth page (beginning with a page selected by using the first number appearing in a random number table), a sampling of 7,504 schools in 46 states was obtained.[104]

An initial analysis of these schools made it immediately apparent that, at least as of 1968, there were few racially mixed schools to study. My objective was to follow up schools with at least a 30 percent but no more than a 70 percent minority enrollment. Only 535 schools, 7.1 percent of the sampling, met this criterion.

The next step was to consult more recent government data, gathered in the fall of 1972,[105] in order to determine what had happened to the 535 schools over a four-year interval. This was done, although a total of 190 schools could not be followed up for one reason or another. There were 95 schools that were not listed at all in the 1972 report, either because they were in small districts not in the 1972 sample or because they had apparently been either closed or renamed; another 66 schools had changed grades significantly (more than one grade level had been added or deleted, not counting changes at the kindergarten or preschool level); 29 more appeared to be special education schools of one kind or another. These latter almost always draw their students on a district-wide basis.

The remaining 345 schools, which at least appeared to be structurally unchanged from 1968 to 1972, comprised 4.6 percent of the original sampling of 7,504 schools. Of these schools, 190 had a minority enrollment that was predominantly black, 151 had a minority enrollment predominantly Hispanic, and 4 had a minority enrollment predominantly Oriental. Omitting the schools with the Oriental minority,[106] Table 1-4 shows the extent of change in the racial composition of the student population between 1968 and 1972. An examination of the table indicates that schools with predominantly black enrollments were more likely both to have a decrease in minority enrollment (even if small) and to resegregate beyond the 70 percent level than schools where the predominant minority was Hispanic. Many of the former cases, as will be shown, involved governmental action, which appears to be more common in schools where the predominant minority group is black. The latter cases perhaps reflect the tendency of schools with a predominantly black enrollment to resegregate more quickly. Overall,

Table 1-4

Change from 1968 to 1972 in proportion of minority enrollment in selected schools in relation to predominant minority groups

Change in proportion of minority enrollment	Predominant minority group				Total number
	Black		Hispanic		
	Number	Percent	Number	Percent	
Decrease	65	34.2	24	15.9	89
Increase, but still within 30 percent to 70 percent range	77	40.5	107	70.9	184
Increase, beyond 70 percent range	48	25.3	20	13.2	68
Total	190	100.0	151	100.0	341

schools in which black enrollments increased from 1968 to 1972 had an average increase of 16.7 percentage points (standard deviation = 14.2). On the other hand, schools where the predominant minority group was Hispanic and where there was an increase in minority enrollment averaged 10.3 percent change (standard deviation = 7.0) over the four-year period. Average *decreases* were 7.0 and 8.7 percent for black and Hispanic schools, respectively. The most common situation in these desegregated schools seems to be one of relatively gradual but steady resegregation.

Is rapid resegregation more likely in large school systems? When the data on schools with predominantly black minority enrollments are broken down by district size, the results are as shown in Table 1-5. These results suggest that there are large numbers of racially mixed schools in small school districts, and many of them seem quite stable; conversely, racially mixed schools in larger districts seem more unstable. These results are consistent with the view that the large and expanding inner-city ghettos in many of these larger school districts are a major factor in resegregating schools serving the areas bordering the inner city.

The problem remains, of course, that these data can be only sugges-

Table 1-5

Change from 1968 to 1972 in proportion of minority enrollment in selected schools in relation to school district enrollment

Change in proportion of minority enrollment	School district enrollment						Total number
	Below 25,000		25,000 to 100,000		Above 100,000		
	Number	Percent	Number	Percent	Number	Percent	
Decrease	46	44.7	16	27.1	3	10.7	65
Increase of 8 percent or less	34	33.0	11	18.6	7	25.0	52
Increase of more than 8 percent	23	22.3	32	54.2	18	64.3	73
Total	103	100.0	59	99.9	28	100.0	190

Note: $X^2 = 27.23$, df = 4, $p < .001$

tive. Without information from individual school districts, one cannot really be sure what is happening in any of these schools. After reviewing the data, the decision was made to seek further information on the 117 schools in 58 school districts that had 8 percentage points or less of increase in minority enrollment between 1968 and 1972. Letters were written to the superintendents of these districts asking for information on each of the 117 schools. This group was chosen because there is ample evidence in the studies cited earlier to explain racial instability. It is stability that is interesting, and it seemed that a superintendent would be more likely to answer a letter asking for an explanation of how one or more schools was *avoiding* resegregation than one asking why a given school became significantly more segregated, given the possible legal implications of the latter question, no matter how innocently asked.

After a first request for information and a follow-up letter to those who did not initially reply, responses with information about 73 of these schools were received from 40 of the 58 school districts. While the quality and quantity of information provided about each school varied widely, analysis of the responses seemed to indicate that the majority of the schools fell into one of three groups.

The first group consisted of twenty-one schools (in seventeen districts) where the relatively stable racial balance could be explained by some outside event, either initiated by the school system or somehow impinging on the school attendance areas. In sixteen of these schools (thirteen districts) the attendance area was changed, busing was used, or there was some other action by the school system. One of these schools has since been closed. Thirteen of these schools furnished information on their current racial proportions: seven experienced a decrease in minority enrollment between 1972 and 1975, two remained the same, and four increased.

In five additional schools (five districts) some event for which the school district was not responsible explained the drop in minority enrollment between 1968 and 1972. One school served a neighborhood where much of the housing used by blacks was demolished, and the proportion of black students in this school has continued to decrease. Another area experienced a black exodus where existing housing was demolished and new housing was located beyond the school's attendance area. In this instance both black and white populations are dropping, with the proportions remaining stable. The general student population at a third school also declined, with a disproportionate decline in black students, because of industrial expansion. This school will eventually be closed. Finally, there are two schools in districts that are approximately sixty miles from a rapidly expanding southwestern city that are experiencing an influx of new white residents, and the proportion of black students in these schools continues to drop.

The second major group consisted of six elementary schools and a high school located in low socioeconomic areas of five major cities. One of the elementary schools has since closed. The remaining five schools have averaged 12 percentage points of increase in minority enrollment over the 1971-1975 period; the high school increased 4 percentage points. The two most stable elementary schools (2 and 4 percentage points of change) serve attendance areas that include white ethnic neighborhoods very resistant to racial (or ethnic) change. In each of the seven cases both white and minority students are notably poor.

The third group contained eighteen schools (thirteen school districts) located in stable rural areas or small towns. Many of the schools, which appear to be the only ones at a particular grade level in the district, are quite stable. Of the fourteen schools for which 1975 racial data were reported, six increased an average of 4 percentage points in minority enrollment, and eight decreased an average of 9 percentage points. The superintendents mentioned such factors as many younger black families moving to the cities and whites moving in from surrounding areas, a formerly black school district being annexed, and the impact of public housing. One school, because it was small, rural, and isolated from the rest of the district, did not benefit as much as other schools in the district from white movement out of a nearby metropolitan area.

Finally, there were twenty-seven schools (in twelve districts) that did not seem to fit any of the categories. In three of these schools all or a significant part of the student population is in special education programs and comes from throughout the district. Another of the schools serves an upper-middle-class urban renewal area where both black and white residents are well off financially. Despite this fact, the school enrollment has increased from 50 percent minority in 1972 to 65 percent in 1975. The minority enrollments at two schools near a major metropolitan area have remained at approximately 53 percent from 1968 through 1975. In this case the superintendent reports that this is a settled, older area with limited housing available and the number of pupils (black and white) declining steadily. Information provided about the remaining seventeen schools in five major metropolitan areas and four schools in two smaller districts was so sketchy that their situations were difficult to analyze. Nine of these schools are in a district where there is extensive busing to achieve racial balance, but the schools themselves are not involved in the busing; six of the nine show an increase in white enrollment.

Taken as a group, all of these schools illustrate once again the close relationship between racial stability in schools and underlying demographic trends in the school attendance area. Because the situation in the schools can itself influence demographic trends, the direction of causality is difficult to specify. Evidence does at least suggest, however, that such phenomena as white ethnic concentrations resistant to neighborhood change, stable small-town populations, or growing white populations attracted by economic opportunities or attractive living situations provide the natural foundation for stable school integration. This contrasts, of course, with the typical metropolitan situation where a growing black population is being steered by a dual housing market into neighborhoods bordering the inner city, so that neighborhood after neighborhood "turns" from white to black -- a situation so common that it seems to have formed the public image of the desegregated school as being an essentially unstable phenomenon. The number of stably integrated schools in small towns and other more favorable situations seems to have made much less impression on the public consciousness.

DESEGREGATION AND INTEGRATION

To what extent is the racially mixed school truly integrated? Are the students merely physically copresent, or are they relating to one another in an environment of mutual understanding and respect? The relationship of the answers to these questions to white withdrawal has not, so far as I know, been formally investigated. Yet this aspect of desegregated schooling seems to me to be at the heart of the whole issue.

Anyone who has spent any time in racially mixed schools, especially high schools, knows that students can be as distant from each other as if they were on separate planets. Blacks sit in one part of the cafeteria, and whites in another; the same is true in classrooms, and at assemblies and athletic events. Some social events may even be held separately. Indeed, there is evidence that school desegregation may actually increase feelings of racial identity and separateness.[107] Petroni, Hirsch, and Petroni conducted extensive interviews with students at a desegregated high school and found few reports of significant cross-racial friendship and understanding.[108] And in a study of three Florida secondary schools immediately after desegregation, Irwin Silverman and Marvin Shaw found that 95 percent of the communication being carried on as students left the school was white with white or black with black.[109] Robert Wolf and Rita Simon concluded that, after seven years of busing in one community, cross-racial friendship had not substantially increased.[110] When this was pointed out to the faculty of one of the elementary schools in the study (a school known for its open, "informal" approach), the faculty unanimously agreed that nothing had ever been done in the school to enhance the development of interracial understanding, friendship, or communication.

A similar situation (this time where white students were in the minority) is described by Schafft, who found the white children in a largely black school avoiding after-school sports, the bathrooms, and the corridors and using their homes rather than the school as the focus of their play activities.[111] The attitude of the faculty was expressed by one of the most competent and well-liked teachers in the school: "If I am to teach, I cannot handle social problems as well."

This seems to be the attitude of American education generally. While a number of studies have investigated interracial attitudes in desegregated schools,[112] the literature is almost devoid of reports about programs that structure the school so that interracial cooperation and understanding are fostered.[113] Yet it should be obvious that schools were never organized with a view to helping people understand each other, and there is no evidence that bringing in students from different racial, class, and neighborhood backgrounds will automatically lead to understanding, appreciation, and friendship.

Perhaps the best analyses of the problems of desegregated versus integrated education are those of Jane Mercer,[114] who has obviously spent much time in racially mixed schools and has done some excellent research on the relationship between interracial friendship, self-esteem, and academic accomplishment. Even though her writings provide excellent descriptions and analyses, however, there is relatively little in them that could serve as a blueprint for the school administrator who is trying to decide what to do tomorrow in order to overcome the racial, class, and cultural gulf that is so frequently a part of racially mixed education.[115] There is a gap here that, in my judgment, may be the key not only to the control of white flight but to the survival of national commitment to school integration.

IN CONCLUSION

The issue of white withdrawal from desegregated schools is an unusually complex one, and the research to date has not been equal to the task of fully explaining all that is involved. Trying to understand this complicated phenomenon is much like trying to put together a giant, confusing jigsaw puzzle with many of the pieces missing. For almost every pattern there seems to be a contrary instance. The research that has been done, like this chapter, contains many gaps in the data presented, many unanswered questions, and many unverified assumptions. The following tentative conclusions do, nonetheless, seem justified.

1. White withdrawal from desegregated schools may or may not occur. Some schools maintain a high level of integration for years, some change slowly, and some resegregate very rapidly. Others

may experience some white withdrawal followed by stability, or even by white reentrance.

2. Racially mixed schools located in areas bordering the inner city present some markedly different patterns of resegregation from schools located in school districts that have experienced district-wide desegregation. It is important not to extrapolate from the one situation to the other.
3. In situations where there has been no governmental action to bring about desegregation, white withdrawal seems to be linked more than anything else to the underlying demographic consequences of increased minority population growth. This growth takes place primarily in neighborhoods located on the edge of the inner city, as area after area "turns" from white to black. The schools "turn" more quickly than the area generally, and they play a significant role in making this process relatively rapid and generally irreversible. Stable school integration seems to be a necessary, if not sufficient, precondition for stable neighborhood integration.
4. Decisions on where to purchase a home or where to send one's children to school are made, not only on the basis of the present situation, but on estimates of what is likely to happen in the future. The belief that presently integrated schools and neighborhoods will shortly resegregate is a major barrier to attracting whites to integrated settings.
5. Little formal research has been done on the motivations behind white withdrawal from desegregated schooling. Worries about the quality of education, student safety, and social status differences may be among the chief causes. To the extent that this is true it could be expected that, other things being equal, school integration would more likely be stable and successful when combined with programs of educational improvement, in settings where concerns about safety are adequately met, and when programs of which parents can be proud are featured.
6. School desegregation ordinarily creates situations that have the potential for both racial and class conflict. The degree of white withdrawal to be expected when there is governmental intervention to desegregate schools may vary depending on the proportion of minority students who are being assigned to a given school and the social-class gap between minority and white students.

7. White withdrawal from desegregated schooling has widely varying costs in different settings. Moving to a nearby segregated suburb, moving outside a county school district, attending a parochial school, attending a private school, transferring to a segregated public school within the same system, or leaving town are examples of options that may or may not be present in any given situation. Each of these options, if available, will have different costs for different families, just as families will have varying abilities to meet those costs. So long as school desegregation is feared (or experienced) as painful, threatening, or undesirable, it can be expected that the number of families fleeing the desegregated school will be proportionate to the cost of alternatives and the family's ability to pay those costs.
8. Although there is a certain degree of racial mixing in many public schools, there may also be a notable lack of cross-racial friendship, understanding, and acceptance. Most of the superintendents who replied to the request for information on racial relations in the survey reported above answered that the racial situation was "calm," or that there were very few "incidents." Few made any claim that they had attained anything like genuine community; nor was there much indication that extensive efforts were being made toward this end.

AND FOR THE FUTURE

Given the incomplete nature of research on white withdrawal from desegregated schooling, policy implications are perhaps better stated as personal opinion rather than as "proven" by the research that has been reviewed in this chapter. The suggestions below are so offered.

1. There is serious need for a thorough, national study of white flight. Scattered case studies and sketchy national data are not enough. Unless the public schools of this country are going to continue to contribute heavily to the development of two societies, one white and one black with neither understanding nor trusting the other, white withdrawal from desegregated schooling needs to be better understood – and avoided. It is significant that the references cited in this paper are from journals of law, political science, economics, education, geography, sociology, psychology, and urban affairs. Any such study would have to be a significantly interdisciplinary effort.

2. While it may be true that government intervention to desegregate schools has in some instances precipitated white withdrawal, it is equally true that the lack of any positive government intervention in the so-called "changing neighborhoods" surrounding the inner city has been responsible for continuous and continuing resegregation. It would be helpful, in discussing problems of school desegregation in major metropolitan areas, to separate the discussion of what to do about inner-city schools from the special problems of resegregating schools on the fringes of the ghetto. If the steady growth of the ghetto is to be arrested, it must be done in the fringe areas. A comprehensive approach to fostering racially stable and integrated neighborhoods and schools would go far toward removing the present connection in the minds of many Americans between school desegregation and eventual resegregation.
3. Finally, there is a great need to emphasize the quality of school integration, and to develop and communicate practical approaches to overcome cultural and class barriers between the races. The available evidence does not suggest that, if one can just get black and white students into the same school building, the rest will take care of itself. It will not. School integration worthy of the name will only come about as the result of conscious, deliberate effort.

Notes

1. The summary, reported in *Education Daily* for October 20, 1975, was prepared for Daniel P. Moynihan, who was reportedly assisting President Ford in dealing withh school desegregation and busing issues.

2. Gary Orfield, "School Integration and Its Academic Critics," *Civil Rights Digest* 5 (Summer 1973): 2-10; Vagn Hansen, "Desegregation, Resegregation, and the Southern Courts," paper presented at the annual meeting of the Southern Political Science Association, Atlanta, 1972, ERIC: ED 083 349.

3. James S. Coleman, "Recent Trends in School Integration," *Educational Researcher* 4 (July-August 1975): 3-12.

4. See, for example, *id.*, "Busing Backfired," *National Observer*, June 7, 1975, 1, 18; *id.*, "Racial Segregation in the Schools: New Research with New Policy Implications. *Phi Delta Kappan* 57 (October 1975):,75-78; *id.*, "Coleman on Jackson on Coleman," *Educational Researcher* 5 (February 1976): 3-4; *id.*, "A Reply to Green and Pettigrew," *Phi Delta Kappan* 57 (March 1976): 454-455. For some critiques of Coleman's work, see Gregg Jackson, "Reanalysis of Coleman's 'Recent Trends in School Integration,'" *Educational Researcher* 4 (November 1975): 21-25; Robert Green and Thomas Pettigrew, "Urban Desegregation and White Flight: A Response

to Coleman," *Phi Delta Kappan* 57 (February 1976): 399-402; Thomas Pettigrew and Robert Green, "School Desegregation in Large Cities: A Critique of the Coleman 'White Flight' Thesis," *Harvard Educational Review* 46 (February 1976): 1-53.

5. Reynolds Farley, "Racial Integration in the Public Schools, 1967 to 1972: Assessing the Effect of Governmental Policies," *Sociological Focus* 8 (January 1975): 7; *id.* and Alma Taeuber, "Racial Segregation in the Public Schools," *American Journal of Sociology* 79 (January 1974): 890.

6. Coleman, "Recent Trends in School Integration"; Christine Rossell, "School Desegregation and White Flight," *Political Science Quarterly* 90 (Winter 1975-76): 679-680.

7. Farley and Taeuber, "Racial Segregation in the Public Schools."

8. Gary Orfield, "White Flight Research: Its Importance, Perplexities, and Possible Policy Implications," in *Symposium on School Desegregation and White Flight*, ed. *id.* (Washington, D.C.: Center for National Policy Review, 1975), 43-68.

9. J. Dennis Lord, "School Busing and White Abandonment of Public Schools," *Southeastern Geographer* 15 (November 1975): 81-92.

10. U.S. Congress, Senate, Select Committee on Equal Educational Opportunity, Hearings before the Select Committee on Equal Educational Opportunity of the U.S. Senate, 91st Congress, 2d Session, May 13, 1970, 743-801.

11. Harold Rose, "The Development of an Urban Subsystem: The Case of the Negro Ghetto," *Annals of the Association of American Geographers* 60 (March 1970): 1-17; Harvey Molotch, *Managed Integration* (Berkeley: University of California Press, 1972).

12. Orfield, "White Flight Research."

13. U.S. Bureau of the Census, "Social and Economic Characteristics of the Metropolitan and Nonmetropolitan Population: 1974 and 1970," *Current Population Reports*, Series P-23, No. 55 (Washington, D.C.: U.S. Government Printing Office, 1975).

14. Studs Terkel, "Two Superintendents Discuss Integration: Inverview," in *Integrated Education*, ed. Meyer Weinberg (Beverly Hills, Calif.: Glencoe Press, 1968), 29-41.

15. Lord, "School Busing and White Abandonment."

16. Orfield, "School Integration and Its Academic Critics."

17. *Ibid.*; Nancy St. John, *School Desegregation: Outcomes for Children* (New York: John Wiley & Sons, 1975). If declines do occur, however, this may contribute to white withdrawal. See Harold Kurtz, *Educational and Demographic Consequences of Four Years of School Desegregation in the Pasadena Unified School District* (Pasadena, Calif.: Pasadena Unified School District, 1975).

18. For a good example of the intelligent and positive use of evaluation research in the process of effectively integrating a formerly segregated school system, see Maurice Eash and Sue Rasher, "Mandated Desegregation and Improved Achievement: A Longitudinal Study," *Phi Delta Kappan* 58 (January 1977): 394-397.

19. Frank Petroni, Ernest Hirsch, and C. Lillian Petroni, *Two, Four, Six, Eight, When You Gonna Integrate?* (New York: Behavioral Publications, 1970).

20. Bioloine Young and Grace Bress, "A New Educational Decision: Is Detroit the End of the School Bus Line?" *Phi Delta Kappan* 56 (April 1975): 515-520.

21. Morris Rosenberg and Roberta Simmons, *Black and White Self-esteem: The Urban School Child* (Washington, D.C.: American Sociological Association, n.d.).

22. "How They Did It in Boston," *School Management* 15 (May 1971): 11-15.

23. John McAdams, "Can Open Enrollment Work?" *The Public Interest*, No. 37 (Fall 1974): 69-88.

24. Leslie Bobbitt, "Discipline in Desegregated Schools," in *Proceedings of Conference on Development in School Desegregation and the Law*, ed. Charles Moody, Charles Vergon, and John Taylor (Ann Arbor: University of Michigan School of Education, 1972), 184-199. ERIC, ED 074 157.

25. Gretchen Schafft, "Together Yet Separate: Territoriality among White Children in Predominantly Black Classrooms," paper presented at the annual meeting of the American Anthropological Association, San Francisco, 1975; see also *Time*, January 12, 1976, 38.

26. See Avery Guest and James Weed, "Ethnic Residential Segregation: Patterns of Change," *American Journal of Sociology* 81 (March 1976): 1088-1111.

27. Micheal Giles, Douglas Gatlin, and Everett Cataldo, "Racial and Class Prejudice: Their Relative Effects on Protest against School Desegregation," *American Sociological Review* 41 (April 1976): 280-288.

28. Lillian Rubin, *Busing and Backlash* (Berkeley: University of California Press, 1972).

29. Rossell, "School Desegregation and White Flight"; Pettigrew and Green, "School Desegregation in Large Cities."

30. Betsy Levin and Philip Moise, "School Desegregation Litigation in the Seventies and the Use of Social Science Evidence: An Annotated Guide," *Law and Contemporary Problems* 39 (Winter 1975): 50-133; Robert Wegmann, "Neighborhoods and Schools in Racial Transition," *Growth and Change* 6 (July 1975): 3-8.

31. Note that the proportion of minority students in the public schools is *typically* half again as much as the proportion of minority citizens in the general population of central cities, so that a 52 percent minority population in the city and a 69 percent minority population in the school system are not at all unusual. See Farley and Taeuber, "Racial Segregation in the Public Schools"; Wegmann, "Neighborhoods and Schools in Racial Transition."

32. Coleman, "Recent Trends in School Integration."

33. *New York Times*, July 11, 1975, 1, 7.

34. U.S. Commission on Civil Rights, *Twenty Years after Brown: Equality of Educational Opportunity* (Washington, D.C.: the Commission, 1975).

35. U.S. Bureau of the Census, "Social and Economic Characteristics of the Metropolitan and Nonmetropolitan Population." This finding may be stronger than it looks. Whites in the central city are poorer than whites in the suburbs, and the poor have more children. Hence one would expect to find more rather than fewer whites of school age in the central city.

36. See Robert Weaver, "The Suburbanization of America," paper presented to the U.S. Commission on Civil Rights at a consultation on "School Desegregation: The Courts and Suburban Migration," Washington, D.C., 1975.

37. See Jean Milgram, "Integrated Neighborhood and Integrated Education," *Integrated Education* 12 (May-June 1974): 29-30; see also Charles Kaiser, " 'Resegregation' the Urban Challenge," *New York Times*, April 25, 1976, section 8.

38. Karl Taeuber and Alma Taeuber, *Negroes in Cities* (Chicago: Aldine Publishing Co., 1965).

39. For a study of stable interracial neighborhoods, see Norman Bradburn, Seymour Sudman, Galen Gockel, and Joseph Noel, *Side by Side* (Chicago: Quadrangle Books, 1971); see also John Diekhoff, "My Fair Ludlow," *Educational Forum* 33 (March 1969): 281-288.

40. Albert Hermalin and Reynolds Farley, "The Potential for Residential Integration in Cities and Suburbs: Implications for the Busing Controversy," *American Sociological Review* 38 (October 1973): 595-610; see also Raymond Zelder, "Racial Segregation in Urban Housing Markets," *Journal of Regional Science* 10 (April 1970): 93-105; Reynolds Farley, "Residential Segregation and Its Implications for School Integration," *Law and Contemporary Problems* 39 (Winter 1975): 164-193.

41. U.S. Bureau of the Census, "Social and Economic Characteristics of the Metropolitan and Nonmetropolitan Population."

42. Molotch, *Managed Integration*.

43. Eleanor Wolf, "Social Science and the Courts: The Detroit Schools Case," *The Public Interest*, No. 42 (Winter 1976): 102-120. If all this is to be placed in context, it is important to be aware that, even ignoring race, ethnic residential segregation is by no means a thing of the past in the United States. Guest and Weed, who studied ethnic residential segregation in Boston, Cleveland, and Seattle, found that the "old" American groups of predominantly Northern European descent, various "newer" groups of later immigration, and racial minorities are all relatively segregated from each other. Ethnic segregation is at least equal to if not greater than that by occupation, and much greater than that by family or life-cycle status. Nor did ethnic segregation seem to be decreasing much, at least from 1960 to 1970. Much of this ethnic segregation is a matter of relative social status, though not all. These findings are consistent with the view that *group* social status is related to ethnic residential segregation. See Guest and Weed, "Ethnic Residential Segregation."

44. For proposed solutions to the spread of segregated housing patterns, see Anthony Downs, "Residential Segregation: Its Effects on Education," *Civil Rights Digest* 3 (Fall 1970): 2-8; also Myron Ross, "Prices, Segregation, and Racial Harmony," *Journal of Black Studies* 2 (December 1971): 225-243.

45. Arthur Stinchcombe, Mary McDill, and Dollie Walker, "Demography of Organizations," *American Journal of Sociology* 74 (November 1968): 221-229.

46. For an excellent bibliography on racially mixed neighborhoods, see Mark Beach, *Desegregated Housing and Interracial Neighborhoods: A Bibliographic Guide* (Philadelphia: National Neighbors, 1975). A number of scholars have built computer models in an attempt to simulate and predict the patterns of ghetto expansion, with interesting if imperfect results. See Richard Morrill, "The Negro Ghetto: Problems and Alternatives," *Geographical Review* 55 (July 1965): 339-361; Rose, "The Development of an Urban Subsystem"; Harold Rose, "The Spatial Development of Black Residential Subsystems," *Economic Geography* 48 (January 1972): 43-65; see also Charles Barresi, "Neighborhood Patterns of Invasion and Succession," paper presented at the annual meeting of the American Sociological Association, Denver, 1971. ERIC: ED 055 124.

47. Rose, "The Development of an Urban Subsystem."

48. Howard Aldrich, "Ecological Succession in Racially Changing Neighborhoods: A Review of the Literature," *Urban Affairs Quarterly* 10 (March 1975): 327-348.

49. Chester Rapkin and William Grigsby, *The Demand for Housing in Racially Mixed Areas* (Berkeley: University of California Press, 1960); Molotch, *Managed Integration*.

50. See Nathan Glazer, "On 'Opening Up' the Suburbs," *The Public Interest*, No. 37 (Fall 1974): 89-111.

51. Eleanor Wolf, "The Tipping Point in Racially Changing Neighborhoods," *American Institute of Planners Journal* 29 (August 1963): 217-222; see also Bradburn *et al.*, *Side by Side*.

52. See Kurtz, *Educational and Demographic Consequences*, Orfield, "White Flight Research." Christine Rossell, in a personal communication, also points out that Inglewood is on the flight path of Los Angeles International Airport. For a description of the politics of school desegregation in Inglewood, see Norene Harris, Nathaniel Jackson, and Carl Rydingsword, "Inglewood, California: An Experience in Desegregation," in *The Integration of American Schools*, ed. Norene Harris, Nathaniel Jackson, and Carl Rydingsword (Boston: Allyn and Bacon, 1975), 78-92.

53. See Eleanor Wolf and Charles Lebeaux, "Class and Race in the Changing City," in *Urban Research and Policy Planning*, ed. Leo Schnore and Henry Fagin (Beverly Hills, Calif: Sage Publications, 1967), 99-129; see also Dickhoff, "My Fair Ludlow."

54. Molotch, *Managed Integration*.

55. Wegmann, "Neighborhoods and Schools in Racial Transition."

56. For data on the lack of interracial neighboring despite interracial housing, see Carolyn Zeul and Craig Humphrey, "The Integration of Black Residents in Suburban Neighborhoods: A Reexamination of the Contact Hypothesis," *Social Problems* 18 (Spring 1971): 462-474; see also Laurence Cagle, "Interracial Housing: A Reassessment of the Equal-Status Contact Hypothesis," *Sociology and Social Research* 57 (April 1973): 342-355.

57. Molotch cites a study by Roper who found that most neighboring behavior in middle-class settings was due directly or indirectly to the visiting patterns of young children. See Molotch, *Managed Integration*, 58.

58. Michael Reagen, *Busing: Ground Zero in School Desegregation: A Literature Review with Policy Recommendations* (Syracuse, N.Y.: Policy Institute, Syracuse University Research Corporation, 1972). On the problems of overly rapid racial transition, see also Malcolm Peabody, Jr., "Custom Changing," *Journal of Intergroup Relations* 2 (Summer 1973): 46-58.

59. Wolf and Lebeaux, "Class and Race in the Changing City."

60. Carl Hansen, *Danger in Washington* (West Nyack, N.Y.: Parker Publishing Co., 1968).

61. Charles Clotfelter, "Spatial Rearrangement and the Tiebout Hypothesis: The Case of School Desegregation," *Southern Economic Journal* 42 (October 1975): 263-271.

62. Rapkin and Grigsby, *The Demand for Housing in Racially Mixed Areas*.

63. Wolf and Lebeaux, "Class and Race in the Changing City"; Rapkin and Grigsby, *The Demand for Housing in Racially Mixed Areas*; Bradburn *et al.*, *Side by Side*.

64. A recent survey by *Neighbors*, a newsletter oriented toward interracial living found, for example, that over 50 percent of the landlords in various sections of the San Francisco area would not rent to applicants with children.

65. Charles Clotfelter, "The Effect of School Desegregation on Housing Prices," *Review of Economics and Statistics* 57 (November 1975): 446-451.

66. See Wegmann, "Neighborhoods and Schools in Racial Transition."

67. See, for example, Morton Grodzins, "Metropolitan Segregation," *Scientific American* 197 (October 1957): 33-41; Hansen, *Danger in Washington*; Wegmann, "Neighborhoods and Schools in Racial Transition"; and [no author], "Note: Merging Urban and Suburban School Systems," *Georgetown Law Journal* 60 (May 1972): 1279-1307. The best conceptual discussion is in Thomas Schelling, *Neighborhood Tipping* (Cambridge, Mass.: Harvard Institute of Economic Research, 1969).

68. Wolf, "Social Science and the Courts"; Levin and Moise, "School Desegregation Litigation in the Seventies."

69. Arthur Stinchcombe, Mary McDill, and Dollie Walker, "Is There a Racial Tipping Point in Changing Schools?" *Journal of Social Issues* 25 (January 1969): 127-136; Wolf, "The Tipping Point in Racially Changing Neighborhoods."

70. The data for 1969-1975 are taken from records kept by the Milwaukee Public School System. The author is a former member of the school board of that city. The data for 1968 are from the U.S. Department of Health, Education, and Welfare. I wish to express my appreciation to members of the Milwaukee Public School staff who helped me obtain this information. A few schools were omitted, although they technically met these criteria: Jackie Robinson (originally Peckham Annex), to which students have been bused from a number of areas and which is now a specialty, nondistrict school; Cass Street Elementary School, which receives a large number of minority students bused in from overcrowded schools outside its district; Jefferson, a nondistrict school for students with reading problems; Pleasant View School for the mentally handicapped; and Gaenslen School for the physically handicapped.

Data on a largely Hispanic school are reported later in this chapter. I have generally set this material aside, preferring to concentrate primarily on white flight from predominantly black schools. The whole issue of the predominantly Hispanic school is an interesting one, but almost no research seems to have been done on this topic.

71. Note Elm and Garden Homes in 1969; Clarke Street in 1970 and 1971; Clemens in 1971; Townsend and Kilbourn in 1972; Silver Spring and Pierce in 1973; Fratney and 27th Street in 1974; and Story in 1975. In reviewing an earlier draft of this chapter, Christine Rossell suggested explicitly mentioning that there were also years in which such movement was markedly absent. Note, for example, 38th Street in 1970 and 1975; Clemens in 1972; Elm and Fratney in 1973; Pierce in 1974; and Wisconsin in 1975.

72. See G. Dwight Rowe, "Educational Outcomes Associated with Ethnic Changes in School Populations," paper presented at the annual meeting of the American Educational Research Association, Washington, D.C., 1975.

73. I made a number of proposals intended to help reduce racial isolation while serving on the school board (1971-1974). With minor exceptions, they were voted down.

74. Wegmann, "Neighborhoods and Schools in Racial Transition."

75. Often a particular home will be physically closer to one school although actually in the attendance zone of another; or a parent may want to avoid his child's crossing a busy street; or a youngster may need to be sent to the next closest school to avoid certain other children who cause him trouble. None of these changes takes the child any great distance, particularly since elementary attendance areas are so much smaller than those for secondary schools.

76. Gregg Jackson, in reviewing an earlier draft of this chapter, pointed out that Table 1-2 would be clearer if the destinations of students transferring from highand low-minority schools were shown separately. The point is well taken; unfortunately the data in Rowe's paper are not presented in a way that makes this separation possible.

77. Eleanor Wolf, "The Baxter Area: A New Trend in Neighborhood Change?" *Phylon* 26 (Winter 1965): 344-353.

78. U.S. Bureau of the Census, "Social and Economic Characteristics of the Metropolitan and Nonmetropolitan Population."

79. The coefficient of correlation between estimated family income and the number of percentage points increase in minority enrollment is 0.45. Statistical significance at the 0.05 level (two-tailed) requires a correlation coefficient of 0.468. Donald Noel, in reviewing an earlier draft of this chapter, suggested that this finding might be stronger than it appears if the schools serving higher-income neighborhoods had a substantially lower proportion of minority students at the beginning of the period 1968-1975. This is, in fact, the case. In 1968 the high-income schools had an average of 15 percent minority enrollment (an average of 9 percent if the one school with substantial minority enrollment is omitted), compared to an average of 38 percent minority enrollment in the lower-income schools. While one might have expected more rapid white withdrawal from schools already having a substantial black population, the reverse was the case.

80. Taeuber and Taeuber, *Negroes in Cities*.

81. See Rossell, "School Desegregation and White Flight." Note that Rossell argues that white withdrawal, even when it does occur at a rate higher than in the years before desegregation, is largely confined to the year of school desegregation. While there is undoubtedly a trend in this direction, I am not certain whether the data are yet extensive enough to establish this trend firmly. Rossell's article, however, defines the issues exceptionally well.

82. "Notes on Busing and School Integration in White Plains, Pasadena, and Harrisburg." Report of the Western Regional School Desegregation Project, University of California, Riverside, 1971. ERIC. ED 066 542.

83. Kurtz, "Educational and Demographic Consequences." In a personal communication, Kurtz suggested that among the reasons for this exceptionally high rate of white withdrawal might be the traditionally high mobility rates in the Los Angeles area; the presence of over eighty other school districts in Los Angeles County; the overwhelmingly white racial composition of contiguous districts; the presence of a large number of private schools in Pasadena and the surrounding area; the relatively high socioeconomic status of the white population; the high proportion of minority students; and the considerable amount of busing involved in the plan. He also attributes the slowing of white withdrawal at the present time to the policies of the new (and antibusing) school board.

84. See Thomas Pettigrew and M. Richard Cramer, "The Demography of Desegregation," *Journal of Social Issues* 15 (No. 4, 1959): 61-71; Donald Matthews and James Prothro, "Stateways versus Folkways: Critical Factors in Southern Reactions to *Brown v. Board of Education*," in *Essays on the American Constitution*, ed. Gottfried Dietze (New York: Prentice-Hall, 1964), 139-156; James Prothro, "Stateways versus Folkways Revisited: An Error in Prediction," *Journal of Politics* 34 (May 1972): 352-364; Charles Bullock and Harrell Rodgers, Jr., "Perceptual Distortion and Policy Implementation: Evaluations of the Effectiveness of School Desegregation Techniques," paper presented at the annual meeting of the Southwest Political Science Association, San Antonio, 1975; Thomas Dye, "Urban School Desegregation," *Urban Affairs Quarterly* 4 (December 1968): 141-165; Farley, "Racial Integration in the Public Schools, 1967 to 1972"; A. B. Cochran and Thomas Uhlman, "Black Populations and School Integration – A Research Note," *Phylon* 34 (March 1973): 43-48; Micheal Giles and Thomas Walker, "Judicial Policy Making and Southern School Segregation," *Journal of Politics* 37 (November 1975): 917-936. The best overall account of the government's attempt to enforce the Civil Rights Act of 1964 with respect to southern schools may be found in Gary Orfield, *The Reconstruction of Southern Education* (New York: John Wiley & Sons, 1969). Many of the above citations discuss the resistance of policy makers to desegregation in areas with substantial black populations. It should be explicitly stated that it is an assumption on my part that the resistance of these policy makers to school desegregation reflects the same fears and attitudes in the white population generally that might lead to white withdrawal following school desegregation. See also Robert Levine, "The Silent Majority: Neither Simple nor Simple-minded," *Public Opinion Quarterly* 35 (Winter 1971-1972): 571-577; John Egerton, *School Desegregation: A Report Card from the South* (Atlanta: Southern Regional Council, 1976).

85. James Bosco and Stanley Robin, "White Flight from Court-Ordered Busing?" *Urban Education* 9 (April 1974): 87-98. Bosco and Robin also believe that this additional decline in white enrollment will not continue.

86. Charles Clotfelter, "School Desegregation, Tipping, and Private School Enrollment," *Journal of Human Resources* 11 (Winter 1976): 28-50. A particularly striking example is given by Craven. In September 1969 there were 2,408 black and 256 white students in one South Carolina school district; after desegregation, only one white student enrolled for the school year 1973-74. See J. Braxton Craven, Jr., "The Impact of Social Science Evidence on the Judge: A Personal Comment," *Law and Contemporary Problems* 39 (Winter 1975): 149-156.

87. Lord, "School Busing and White Abandonment of Public Schools."

88. Micheal Giles, Everett Cataldo, and Douglas Gatlin, "White Flight and Percent Black: The Tipping Point Reexamined," *Social Science Quarterly* 56 (June 1975): 85-92.

89. Farley, "Racial Integration in the Public Schools, 1967 to 1972." For a recent report on the situation in Memphis, see "Public Schools in Memphis: Struggling but with Head Well above Water," *Southern Journal* 4 (Spring 1975): 2-5.

90. *New York Times*, July 11, 1975, 7.

91. Pettigrew and Green, "School Desegregation in Large Cities."

92. U.S. Bureau of the Census, "1970 Census of Population and Housing: Memphis, Tenn.-Ark. SMSA," PHC (1)-127 (Washington, D.C.: U.S. Government Printing Office, 1972).

93. Owen T. Thornberry, "Sociological Factors," in *Memphis in the 70s*, ed. Bergin S. Merrill, Jr. (Memphis: Memphis State University, 1970), 242-257.

94. John Egerton, "Report Card on Southern School Desegregation: Jackson and Nashville," *Saturday Review* 55 (April 1, 1972): 41-42, 47-48.

95. *Time*, December [illegible] 1975, 54.

96. U.S. Bureau of the Census, "1970 Census of Population and Housing: Jackson, Mississippi SMSA," PHC (1)-94 (Washington, D.C.: U.S. Government Printing Office, 1972).

97. Morrill, "The Negro Ghetto."

98. Howard Ravis, "The School District of Kankakee, Illinois," *School Management* 15 (August 1971): 15-21.

99. "Public Schools in Memphis," *Time*, December 15, 1975. One of the points made in this article is that the private schools that sprang up in Memphis after large-scale court-ordered desegregation are now becoming institutionalized.

100. Lord, "School Busing and White Abandonment of Public Schools."

101. Everett Cataldo, Micheal Giles, Deborah Athos, and Douglas Gatlin, "Desegregation and White Flight," *Integrated Education* 13 (January-February 1975): 3-5; see also Clotfelter, "School Desegregation, Tipping, and Private School Enrollment."

102. U.S. Department of Health, Education, and Welfare, *Directory of Public Elementary and Secondary Schools in Selected Districts: Fall 1968* (Washington, D.C.: U.S. Government Printing Office, 1970).

103. Anyone familiar with school systems knows that such data, no matter how "hard" they may look, should not be taken too seriously. Some schools keep much better records than others; some school employees are reluctant to ask a student his race, if they are not certain of it; some school systems use computerized record keeping of variable accuracy, completeness, and consistency. The HEW report itself mentions how often reports came in with the district total not matching the sum of the individual schools in the district. Attendance changes daily in many large urban school systems, and records of both enrollment and attendance can leave much to be desired. For all of these reasons such figures are at best approximate; hence, I have generally rounded off percentages to the nearest whole number, rather than give an impression of more precision than is really the case.

104. I have used the word "sampling" deliberately since this is clearly not a random sample of schools throughout the country. Vagaries of page layout make it at best a kind of cluster sample of a stratified sample. Given all the other uncertainties about these schools, one must state again that these results are intended to be only suggestive.

105. U.S. Department of Health, Education, and Welfare, *Directory of Public Elementary and Secondary Schools in Selected Districts: Fall 1972* (Washington, D.C.: U.S. Government Printing Office, 1974).

106. A valuable perspective on changing racial ratios in largely black schools might well come from the study of racial and ethnic change in schools generally. In the four schools where the predominant minority group was Oriental, all increased in minority

enrollment between 1968 and 1972, averaging almost 13 percentage points of change per school.

107. See Bobbitt, "Discipline in Desegregated Schools"; David Armor, "The Evidence on Busing," *The Public Interest*, No. 28 (Summer 1972): 90-126; St. John, *School Desegregation*.

108. Petroni, Hirsch, and Petroni, *Two, Four, Six, Eight, When You Gonna Integrate?*

109. Irwin Silverman and Marvin Shaw, "Effects of Sudden, Mass School Desegregation on Interracial Interaction and Attitudes in One Southern City," paper presented at the annual meeting of the Eastern Psychological Association, New York, 1971. ERIC: ED 053 410. See also Leonard Marascuilo and Fred Dagenais, "Identification of Social Groups Based on Social Integration in a Multiracial High School," paper presented at the annual meeting of the American Educational Research Association, Chicago, 1974. ERIC: ED 094 031. An early study of this problem is Morrill Hall and Harold Gentry, "Isolation of Negro Students in Integrated Public Schools," *Journal of Negro Education* 38 (Spring 1969): 156-161.

110. Robert Wolf and Rita Simon, "Does Busing Improve the Racial Interactions of Children?" *Educational Researcher* 4 (January 1975): 5-10; see also Armin Beck, Eliezer Krumbein, and F. D. Erickson, "Strategies for Change: Conditions for School Desegregation," *Phi Delta Kappan* 50 (January 1969): 280-283; and Louise Singleton, Steven Asher, and Florence Alston, "Sociometric Ratings and Social Interaction among Third Grade Children in an Integrated School District," paper presented at the annual meeting of the American Educational Research Association, San Francisco, 1976.

111. Schafft, "Together Yet Separate."

112. In addition to the studies already cited, see Lawrence G. Felice, "Mandatory Busing and Minority Student Achievement: New Evidence and Negative Results," paper presented at the annual meeting of the American Sociological Association, San Francisco, 1975; and Nancy St. John and Ralph Lewis, "Race and the Social Structure of the Elementary Classroom," *Sociology of Education* 48 (Summer 1975): 346-368. Throughout their book, *The Integration of American Schools*, Harris, Jackson, and Rydingsword have a good sense of the difference between mere segregation and real integration.

113. Among the few examples are Elliot Aronson, Nancy Blaney, Jev Sikes, Cookie Stephan, and Matthew Snapp, "The Jigsaw Route to Learning and Liking," *Psychology Today* 8 (February 1975): 43-50; Elizabeth Cohen, Marlaine Lockheed, and Mark Lohman, "The Center for Interracial Cooperation: A Field Experiment," *Sociology of Education* 49 (January 1976): 47-58; David DeVries and Keith Edwards, "Student Teams and Learning Games: Their Effects on Cross-Race and Cross-Sex Interaction," *Journal of Educational Psychology* 66 (October 1974): 741-749; and Walter Stephan and James Kennedy, "An Experimental Study of Interethnic Competition in Segregated Schools," *Journal of School Psychology* 13 (Fall 1975): 234-247.

114. Jane Mercer, "Evaluating Integrated Education," in *School Desegregation, Public Information and the Media*, ed. Charles Moody and Charles Vergon (Ann Arbor: University of Michigan School of Education, 1973), 33-49; Jane Mercer, "Research Findings in School Desegregation," in *Report on the Future of School Desegre-*

gation in the United States, ed. Ogle Duff (Pittsburgh: University of Pittsburgh Consultative Resource Center on School Desegregation and Conflict, 1973), 94-122; Jane Mercer, Marietta Coleman, and Jack Harloe, "Racial/Ethnic Segregation and Desegregation in American Public Education," in *Uses of the Sociology of Education*, Seventy-third Yearbook of the National Society for the Study of Education, Part II, ed. C. Wayne Gordon (Chicago: University of Chicago Press, 1974), 274-329.

115. An excellent overview of what this involves can be found in Gary Orfield, "How to Make Desegregation Work: The Adaptation of Schools to Their Newly-Integrated Student Bodies," *Law and Contemporary Problems* 39 (Spring 1975): 313-340; see also Nate Jackson and Carl Rydingsword, "Desegregated High Schools Need Strong, Innovative Principals: An Interview with David Reiss," in Harris, Jackson, and Rydingsword, *The Integration of American Schools*, 207-214; and Lorenzo Thomas, "Creativity and Stress in Recently Integrated Schools," *Freedomways* 15 (Summer 1975): 221-225.

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The "White Flight" Controversy

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In the spring of 1975, James Coleman released the "preliminary results" of a new study concluding that school desegregation contributed to "white flight" from big cities and was fostering resegregation of urban districts. On the basis of his findings, Coleman maintained that whites were leaving both large and middle-sized cities with high proportions of blacks, and specifically that whites in big cities were fleeing integration, while whites in middle-sized cities were "not moving any faster from rapidly integrating cities than from others." In short, according to Coleman, "the flight from integration appears to be principally a large-city phenomenon."

In the most controversial passage of his study, Coleman argued:

> The extremely strong reactions of individual whites in moving their children out of large districts engaged in massive and rapid desegregation suggest that in the long run the policies that have been pursued will defeat the purpose of increasing overall contact among races in schools. . . . Thus a major policy implication of this analysis is that in an area such as school desegregation, which has important consequences for individuals and in which individuals retain control of some actions that can in the end defeat the policy, the courts are probably the worst instrument of social policy.

Coleman's study provoked bitter attacks from proponents of activist desegregation policies, such as Roy Wilkins and Kenneth Clark, not only because his findings were inimical to their cause, but because his "defection" seemed especially traitorous. After all, he had been the principal author of the Equal Educational Opportunity Survey (known as the Coleman Report), which had been authorized by Congress as part of the Civil Rights Act of 1964 and had served, since its publication in 1966, as the chief evidence of the beneficial effects of school desegregation. Coleman had also taken an outspoken public role as a leading scholarly advocate of school desegregation.

Coleman presented his paper (co-authored by Sara Kelly and John Moore of the Urban Institute) at a meeting of the American Educational Research Association on April 2, 1975, but it was not reported in *The New York Times* until June 7, 1975. (Some of Coleman's adversaries later attacked him for carrying his views to the press, but the delay in reporting the story indicates that he did not initiate the media attention.) Then, on July 11, 1975, Robert Reinhold of *The New York Times* reported that the 20 central-city districts in Coleman's study had not undergone court-ordered busing, and Coleman admitted that his views "went somewhat beyond the data." He acknowledged that he had not studied the effects of busing, since the cities under scrutiny had not been subject to court order, and he conceded that he had been "quite wrong" to have called the integration "massive" where it had occurred. But he nonetheless defended the overall implication of his work and continued to maintain that court-imposed desegregation exacerbated the rate of "white flight."

Mobilized by Coleman's well-publicized statements, scholars committed to desegregation lost no time in taking issue with his findings. On August 15, 1975, a "Symposium on School Desegregation and White Flight" was convened, funded by the National Institute of Education, co-sponsored by the Catholic University Center for National Policy Review and the Notre Dame Center for Civil Rights, and hosted by the Brookings Institution. Though Coleman was a participant, the papers that emerged from the symposium consisted entirely of rebuttals of his position. Later, Gregg Jackson, of the United States Commission on Civil Rights, criticized both Coleman's data and his methodology in two articles, a technical version in *Educational Researcher* (November 1975) and a popular version in *Phi Delta Kappan* (December 1975). Coleman's claim that desegregation accelerated "white flight" was vigorously denounced by Robert Green, of Michigan State University, and Thomas Pettigrew, of Harvard University, first at a press conference called by the NAACP, and then in jointly written articles in *Phi Delta Kappan* (February 1976) and in *Harvard Educational Review* (February 1976). Green and Pettigrew charged that Coleman had been selective in his choice of school districts and that their own reanalysis of districts with more than 75,000 pupils revealed no correlation between the degree of desegregation and the rate of "white flight."

There were three major criticisms of Coleman's study: that his conclusions were invalid because he did not look at enough districts and because the districts he did examine had not undergone court-ordered desegregation; that "white flight" from central cities is a long-term phenomenon predating school desegregation; and that desegregation does not cause "white flight" since the same level of "white flight" can be observed in big cities whether or not they have enacted desegregation plans. The policy implication of these criticisms is that framers of desegregation plans need not be concerned about the impact of "white flight," because desegregation does not cause greater numbers of whites to leave than would have left anyway. Green and Pettigrew state this directly:

> While extensive school desegregation may hasten the white flight phenomenon, particularly in the largest nonmetropolitan districts in the South, the effect, if it obtains at all, may only be temporarily during the first year of desegregation, and then only for those families which have already made plans to move.

THE counterargument against Coleman was strengthened during the summer of 1975 by another new study of the effects of desegregation on "white flight," written by Christine Rossell, an assistant professor of political science at Boston University. Her paper, presented to the American Political Science Association in September 1975 and published in *Political Science Quarterly* (Winter 1975), sought to establish definitively that school desegregation causes "little or no significant white flight, even when it is court ordered and implemented in large cities." Gary Orfield, editor of the papers from the August symposium on "white flight" (and also an author of one of the rebuttals to Coleman), called Rossell's study "particularly impressive," and Robert Green described it as "the most serious challenge to the Coleman position." And indeed, Rossell sought not only to refute Coleman's arguments but to prove that desegregation had little or no impact on "white flight," and that "white flight" was, at most, a temporary and minimal occurrence.

Rossell collected data from 86 school districts and grouped them by the degree to which students had been reassigned for purposes of school integration. She came to the conclusion that of the 10 districts with the highest degree of desegregation, only two (Pasadena and Pontiac) experienced any significant "white flight," but it was "minimal (about a 3-percent increase over the previous trend) and temporary." The whole group of cities with the highest amount of desegregation showed "a negligible increase of about 1 percent from the previous trend":

> The important phenomenon here is that any loss of whites occurs *before* school opens in the first year of the plan. After that, white flight stabilizes to a rate slightly better than the pre-desegregation period. Therefore, white flight, if it occurs at all, occurs not from the problems experienced during the first year of desegregation, but from the fear of problems. In other words, if whites leave, it is typically not because they participated in the plan and did not like it, but because they refused to participate at all.

Busing did not cause "white flight," she held, since she found "no significant increase in white flight in Northern school districts that desegregated under court order." Where Coleman had asserted that "white flight" was greatest in large districts undergoing rapid desegregation, Rossell disagreed:

> The two large school districts, San Francisco and Denver, that engaged in such massive and rapid desegregation show no significant white flight. Nor do most of the other large school districts that implemented

> lesser degrees of school desegregation (Seattle; Milwaukee; Kansas City, Mo.; Indianapolis; Baltimore; Philadelphia; Los Angeles; and Chicago). Thus the data of the present study contradict almost every claim Coleman has made regarding school desegregation and white flight.

Indeed, according to Rossell, mandatory city-wide school desegregation may be the best means to insure racial stability:

> While almost all school districts (with the exception of Berkeley, California) are still experiencing white flight, it is quite encouraging that by the second and third year after desegregation, the school districts engaging in massive and rapid desegregation have a rate of white flight that is lower than their rate in the predesegregation period and lower than that of any other group [of cities in the study], including those that did not implement any desegregation at all. This is a heartening phenomenon and may mean that school desegregation and the educational innovation that typically accompanies it when it is city wide, could impede the increasing ghettoization of American cities.

Thus, in Rossell's view, not only is school desegregation *not* a cause of "white flight," it may actually be the *remedy* for whatever minimal "white flight" occurs.

But if Rossell is right, how could a distinguished scholar like James Coleman have become so concerned about a relatively insignificant problem? Why had the media accepted the idea that "white flight" was of large proportions, when it was no more than one or two percent of white pupils each year? Conversely, how did Rossell come to the conclusion that "white flight" was minimal and of little or no significance?

To understand Rossell's optimistic conclusions, it is necessary to follow her method of calculating the rate of "white flight." She measured the effect of desegregation on "white flight" by observing changes in the percentage of white pupils enrolled in public schools before and after the major desegregation plan in each city, for as many years as data were available, with 1972-73 the final year of the study. If a district was 58-percent white one year, then dropped to 56-percent white and then to 53-percent white, Rossell would say that the district lost 2 percent the first year, 3 percent the second, and so on. For example, Table I (on the following page) presents five of the cities she analyzed, all in her "high desegregation" group. Thus, Rossell represents the decline in percentage white in Pasadena before desegregation with the following figures: –2.7, –1.5, –1.9, –2.1, –2.0, –2.4. A desegregation plan was adopted in 1970, and in that year the figure representing white decline was –4.2; in the next two years, the figures were –4.5 and –2.5. In San Francisco, where a "massive and rapid" court-ordered busing plan was implemented in 1971, before desegregation the figures were –2.9, –1.2, 0, –4.1, –.2; after desegregation, they were –3.0 and –2.1. (Rossell ob-

TABLE I. *Change in Percentage of White Students in "High Desegregation" Cities (Rossell's Calculations)*[1]

	PERCENTAGE OF PUPILS REASSIGNED	7	6	YEARS BEFORE PLAN DATE 5	4	3	2	1	PLAN DATE		YEARS AFTER PLAN DATE 1	2	3	4
Pasadena[2]	93.48%	71.6%	69.9%	67.4%	65.5%	63.4%	61.4%	59.0%	1970	51.8%	50.3%	47.8%	——	——
Pontiac[2]	83.47	74.7	73.4	72.4	69.4	66.3	64.6	62.2	1971	56.8	56.4	——	——	——
Berkeley	57.72	——	——	54.0	51.8	49.6	50.3	48.7	1968	46.5	45.9	45.1	45.2%	46.1%
San Francisco[2]	42.49	——	45.3	42.4	41.2	41.2	37.1	36.9	1971	33.9	31.8	——	——	——
Denver[2]	21.64	——	——	70.4	69.1	67.7	66.2	65.6	1969	64.1	61.7	60.3	58.3	——

[1] Source: Paper presented by Rossell before the American Political Science Association (September 1975).
[2] Court-ordered desegregation.

TABLE II. *Racial Change in Pasadena Public Schools**

YEAR	TOTAL NUMBER OF PUPILS	WHITES NUMBER OF PUPILS	PERCENTAGE OF TOTAL	MINORITIES NUMBER OF PUPILS	PERCENTAGE OF TOTAL	WHITE LOSS NUMBER OF PUPILS	PERCENTAGE OF 1968 NUMBER
1968	31,259	19,201	61.4%	12,058	38.6%	——	——
1972	26,225	12 523	47.8	13,702	52.2	6,678	34.8%

*Source: Author's calculations.

tained these figures by substracting the percentage white in any given year from the percentage white in the previous year.) As noted earlier, Rossell argued that none of the cities in her study except Pasadena and Pontiac experienced any significant "white flight," and even in those two cities it was minimal and temporary. Indeed, since her method of comparing percentages yields such small figures to represent the declining proportions of white pupils each year, "white flight" appears to be a sorely overdramatized issue.

Unhappily, this is not the case. Rossell has selected a statistical method that will show small declines even in the face of large absolute movements. Consider, for example, a school district with 250,000 pupils, 200,000 whites (80 percent of the total) and 50,000 blacks (20 percent of the total). If 40,000 white pupils were to leave the district in a single year, it would then have 160,000 whites (76.2 percent of the total) and 50,000 blacks (23.8 percent of the total). Rossell would say that the change in the percentage white was –3.8, that is, a drop of 3.8 *percentage points. But what has actually happened is that 20 percent of the white pupils have left the district* (since 40,000 is 20 percent of 200,000). It is precisely Rossell's method of calculating "white flight" by subtracting percentages that leads her to her conclusions. In Pasadena, for example, Rossell's tables show a decline in percentage white from 61.4 percent in 1968 to 47.8 percent in 1972, a drop of 13.6 points. But the absolute numbers of whites in the Pasadena school system declined by 34.8 percent, while the absolute number of minorities rose slightly (see Table II on the previous page).

Since Rossell maintains that "white flight" rarely occurs after desegregation, it is worth noting that the Pasadena school district continued to lose white pupils: By 1976-77, its total enrollment was 25,718, and its white population had declined to 9,839, a loss of 48.8 percent of the number of whites enrolled in 1968 and of 21.4 percent of whites enrolled in 1972.

Rossell explains why she preferred to compare percentages rather than absolute numbers:

> Coleman . . . measures loss in white enrollment in a way that may tend to exaggerate white flight in some cities. He compares the raw figures on white enrollment in the previous year and then claims white flight if the latter is lower than the former. Yet one can easily predict cases where due to job layoffs, factory closings, etc., both whites and blacks leave a city at a faster rate than before, but blacks leave at a higher rate. Although this would result in the percentage black decreasing and the percentage white increasing, Coleman would still call this white flight, even though it might more properly be called "black flight." In the final analysis, the most important variable for policy purposes is the percentage white, not the number white.

However, this criticism applies not to anyone using absolute numbers, which clearly reveal any joint fluctuation of racial groups, but to the researcher using only percentages, which can mask substan-

TABLE III. *Racial Change in "High Desegregation" Cities**

CITY	YEAR	TOTAL NUMBER OF PUPILS	WHITES NUMBER OF PUPILS	WHITES PERCENTAGE OF TOTAL	MINORITIES NUMBER OF PUPILS	MINORITIES PERCENTAGE OF TOTAL	WHITE LOSS NUMBER OF PUPILS	WHITE LOSS PERCENTAGE OF 1968 NUMBER
Pontiac	1968	23,832	15,789	66.3%	8,013	33.7%	—	—
	1972	21,141	11,929	56.4	9,212	43.6	3,860	24.4%
Berkeley	1968	16,204	7,535	46.5	8,669	53.5	—	—
	1972	15,213	7,017	46.1	8,196	53.9	518	6.9
San Francisco	1968	94,154	38,824	41.2	55,330	58.8	—	—
	1972	81,970	26,067	31.8	55,903	68.2	12,757	32.9
Denver	1968	96,577	63,398	65.6	33,179	34.4	—	—
	1972	91,616	53,412	58.3	38,204	41.7	9,986	15.8

*Source: Author's calculations.

TABLE IV. *"Percentage White in Boston Public Schools, 1964-1975" (Rossell's Calculations)**

1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	(ESTIMATED) 1975
75.6	74.2	73.9	72.4	68.5	66.0	64.1	61.5	59.6	57.2	52.3	47.8

*Source: Press release by Rossell (December 1975).

tial changes in enrollments. In other words, Rossell is criticizing her own technique. For example, when black enrollment is growing while white enrollment is fairly stable, as it was in Boston during the 1960's, the method of comparing percentages gives an impression of "white flight" where none exists.

The best way to avoid the choice between percentages and absolute numbers is to supply both. When both are presented for the four other districts used by Rossell (in Table I), a very different picture emerges, as evident from Table III on the preceding page. Only in Berkeley, a small atypical university town that initiated its own desegregation plan, not under court order, was the white pupil loss truly insignificant. San Francisco, which Rossell maintains had "no significant white flight," lost one third of its white pupils during the period of her study. Furthermore, subsequent events in San Francisco and Denver (the two large urban districts with massive court-ordered desegregation) do not sustain her hypothesis that "white flight" rarely occurs after the implementation of major desegregation plans. A court order was enacted in San Francisco in 1971; the number of white pupils in public schools there declined from 26,067 in 1972 to 14,958 in 1976, a loss of 42.6 percent of white enrollment in only four years. Nor did Denver, where a city-wide plan was imposed in 1974, maintain its white enrollment: Its 53,412 white pupils in 1972 declined to 36,539 in 1976, a loss of nearly a third of the white pupils in four years. In September 1977, Denver's white pupils declined by another 3,000 to 47.0 percent of the Denver system, having dropped from a majority of 65.6 percent in 1968 and 58.3 percent in 1972. Any statistical method that declares these demographic shifts "insignificant" is, at the very least, not very useful.

The use of Rossell's statistical method in the case of Boston, that maelstrom of desegregation woes, is so at variance with common knowledge as to throw social science into disrepute. Rossell released the following statement to the press in December 1975:

> Much has been made of the claim that school desegregation in Boston (Phase I in the Fall of 1974 and Phase II in the Fall of 1975) has caused massive white flight. The accompanying graph and table indicate that the decline in the percentage white enrolled in the public schools is part of a trend that began at least as early as 1964 and probably earlier. While the implementation of school desegregation appears to have somewhat accelerated this trend, a projection of the former trend indicates that Boston would have been a majority non-white system, even if it had *not* desegregated, by the fall of 1976. Therefore, desegregation is only responsible for accelerating by one year, the trend toward a majority non-white school system.

This statement was accompanied by Table IV (shown on the preceding page).

But consider the absolute figures, which are shown in Table V (on page 143). The absolute figures reveal that white enrollment

TABLE V. *Enrollment in the Boston Public Schools, 1964-1976*[*]

YEAR	TOTAL NUMBER OF PUPILS	WHITES		MINORITIES		WHITE LOSS	
		NUMBER OF PUPILS	PERCENTAGE OF TOTAL	NUMBER OF PUPILS	PERCENTAGE OF TOTAL	NUMBER OF PUPILS	PERCENTAGE OF NUMBER IN PREVIOUS YEAR
1964	91,800	69,400	75.6%	22,400	24.4%	—	—
1965	93,055	69,046	74.2	24,009	25.8	359	0.5%
1966	92,127	68,082	73.9	24,045	26.1	964	1.4
1967	92,441	66,927	72.4	25,512	27.6	1,155	1.7
1968	94,174	64,509	68.5	29,665	31.5	2,418	3.6
1969	94,885	62,624	66.0	32,261	34.0	1,885	2.9
1970	96,696	61,982	64.1	34,714	35.9	642	1.0
1971	96,400	59,286	61.5	37,114	38.5	2,696	4.3
1972	96,239	57,358	59.6	38,881	40.4	1,928	3.3
1973	93,647	53,593	57.2	40,054	42.8	3,765	6.6
1974	85,826	44,937	52.4	40,889	47.6	8,656	16.2
1975	76,461	36,243	47.4	40,218	52.6	8,694	19.3
1976	76,889	34,561	45.0	42,328	55.0	1,682	4.6

[*]Source: Author's calculations.

dropped by 7,418 (10.7 percent) from 1964 until 1970, an average loss of 1.8 percent annually. However, the loss in white pupils from 1970 through 1976 was 27,421 (44 percent), four times the rate of the previous six years. "White flight" was significantly higher during the implementation of the desegregation plan, and there is simply no way of knowing whether those who left had already been planning to go. It is possible to argue that the 1974-1975 desegregation of Boston's public schools was necessary and correct regardless of the number of whites who left the system. But it is indefensible to argue, against the evidence, that the desegregation plan caused only a one-year acceleration in the transition to a majority non-white school system.

We have inspected Rossell's case against Coleman in detail because it illustrates some of the issues involved in the debate. But the argument concerns more than the proper presentation of the data on declining white enrollments. Coleman also used econometric models to attempt to determine the extent to which desegregation as such was leading to declining white enrollments. These models could take into account the effect of whether a city was Southern or not, whether it had nearby high-percentage-white suburbs, and whether a trend independent of desegregation was reducing white enrollment (suburban movement or other factors). On these matters, the debate is too technical to summarize easily.

One of the issues was the proper measure of desegregation. Coleman argued that, independent of the specific causes (e.g., a court order) leading to it, an increase in the degree to which whites are exposed to blacks seemed, under certain circumstances, to reduce the number of whites. Ultimately, Coleman's model required some important qualifications. The increase in the amount of "white flight" that occurred with an increase in desegregation was particularly marked in larger cities, in cities with a large black school population, and in cities with adjacent school districts with a high proportion of white students. Coleman's conclusions, supported by mathematical models, also seem to conform to common sense and experience. His models have been modified, attacked, and retested, but the general conclusions still hold. After reanalyzing the data and taking into account various criticisms made of Coleman, Charles Clotfelter has concluded:

> The estimates in the current paper of the effect of desegregation—measured by hypothetical changes in exposure rates—support the view that desegregation has a strong overall effect on white enrollments in the largest school districts. Within these large districts, however, desegregation is a significant stimulus of white losses only in districts where blacks make up more than 7 percent of students. . . . For smaller districts, response to desegregation appears to be less intense. . . .

By attempting to deny the long-term significance of "white flight" and by refusing to acknowledge the impact of court-ordered busing on white pupil losses, Coleman's critics have confused and confounded the analysis of desegregation policy. Worse yet, the issue has been unfairly politicized by the charge that those who worry about the relationship between desegregation and "white flight" are subverting the civil rights organizations. In view of the rate of white exodus from the public schools of Boston, Denver, and San Francisco, as well as the projected declines in Los Angeles after the implementation of busing, it is impossible to contend that court-ordered racial assignment does not accelerate "white flight" in large cities. It is not a contradiction to recognize that cities where there has been no court-ordered busing have also experienced significant "white flight" (though in no city has the rate of "white flight" been as great in a single year as it was in Boston in 1974 and again in 1975). No matter how many qualifications are attached to Coleman's methodology or research design, his central concern about the diminishing number of whites in urban schools remains valid.

This conclusion should not be misunderstood: Even if it were clearly proved that desegregation causes "white flight," it would still be imperative to eliminate unconstitutional racial discrimination. Certainly, no one—least of all, Coleman—would propose maintaining racially segregated schools as a way of inducing whites to remain in city schools. Coleman's question, raised not in defense of segregation but about the long-range utility of system-wide racial balance plans, was whether court-ordered busing makes desegregation harder to achieve by hastening the departure of whites from city schools. "White flight," in cities under court order and in cities not under court order, is a real problem; it will not be solved by denying its existence or seriousness.

The table on pages 146 and 147 demonstrates the extent of racial change in the 29 biggest cities in the United States from 1968 to 1976. (This list is of *big-city school districts,* not districts that have been made large by court order for purposes of integration.) All have had desegregation controversies, but only a few have court-ordered racial balance plans. *Of the 29 biggest city school districts in the nation, only eight still have a white majority:* Milwaukee, Jacksonville, Columbus, Indianapolis, San Diego, Seattle, Nashville, and Pittsburgh. And three of these eight are fast approaching the 50-percent mark (Milwaukee, Indianapolis, and Pittsburgh). During this eight-year period, the following districts made the transition from majority white to majority non-white: Los Angeles, Houston, Miami, Dallas, Denver, Boston, Cincinnati, and Kansas City.

It seems unlikely that we will ever know with any degree of certainty whether whites (and some middle-class blacks) are leaving the city because of concern about desegregation or crime or poor services or racial tensions or the quality of life or for some other reason or combination of reasons. But if it is impossible to measure the precise impact of school desegregation on "white flight," it is equally insupportable to claim that there is no effect whatever. Court-ordered busing may or may not be the primary stimulus of

Table VI. *Racial Change in Urban Public Schools, 1968-1976*[1]

City[2]	Year	Total Number of Pupils	Whites Number of pupils	Whites Percentage of Total	Minorities[3] Number of pupils	Minorities[3] Percentage of Total	White Loss Number of pupils	White Loss Percentage of 1968 Number	Total Loss Number of pupils	Total Loss Percentage of 1968 Number
New York City	1968	1,063,787	467,365	43.9%	596,422	56.1%				
	1976	1,077,190	328,065	30.5	749,125	69.5	139,300	29.8%	(+13,403)	(+1.3%)
Los Angeles	1968	653,549	350,909	53.7	302,640	46.3				
	1976	592,931	219,359	37.0	373,572	63.0	131,550	37.5	60,618	9.3
Chicago	1968	582,274	219,478	37.7	362,796	62.3				
	1976	524,221	130,785	25.0	393,436	75.0	88,693	40.4	58,053	10.0
Houston	1968	246,098	131,099	53.3	114,999	46.7				
	1976	210,025	71,794	34.2	138,231	65.8	59,305	45.2	36,073	14.7
Detroit	1968	296,097	116,250	39.3	179,847	60.7				
	1976	239,214	44,614	18.7	194,600	81.3	71,636	61.6	56,883	19.2
Philadelphia	1968	282,617	109,512	38.7	173,105	61.3				
	1976	257,942	82,010	31.8	175,932	68.2	27,502	25.1	24,675	8.7
Miami	1968	232,465	135,598	58.3	96,867	41.7				
	1976	239,994	98,362	41.0	141,632	59.0	37,236	27.5	(+7,529)	(+3.2)
Baltimore	1968	192,171	66,997	34.9	125,174	65.1				
	1976	160,121	38,992	24.4	121,129	75.6	28,005	41.8	32,050	16.7
Dallas	1968	159,924	97,888	61.2	62,036	38.8				
	1976	139,080	53,008	38.1	86,072	61.9	44,880	45.8	20,844	13.0
Cleveland	1968	156,054	66,324	42.5	89,730	57.5				
	1976	122,706	46,383	37.8	76,323	62.2	19,941	30.1	33,348	21.4
Washington, D.C.	1968	148,725	8,280	5.6	140,445	94.4				
	1976	126,587	4,484	3.5	122,103	96.5	3,796	45.8	22,138	14.9
Milwaukee	1968	130,445	95,161	73.0	35,284	27.0				
	1976	109,565	61,738	56.3	47,827	43.7	33,423	35.1	20,880	16.0
Memphis	1968	125,813	58,271	46.3	67,542	53.7				
	1976	117,496	33,848	28.8	83,618	71.2	24,423	41.9	8,317	6.6
Jacksonville	1968	122,637	87,999	71.8	34,638	28.2				
	1976	110,707	73,730	66.6	36,977	33.4	14,269	16.2	11,930	9.7

St. Louis	1968	115,582	42,174	36.5	73,408	63.5				
	1976	81,492	23,210	28.5	58,282	71.5	18,964	45.0	34,000	29.5
New Orleans	1968	110,783	34,673	31.3	76,110	68.7				
	1976	93,364	17,933	19.2	75,431	80.8	16,740	48.3	17,419	15.7
Columbus, Ohio	1968	110,699	81,655	73.8	29,044	26.2				
	1976	96,372	64,657	67.1	31,715	32.9	16,998	20.8	14,327	12.9
Indianapolis	1968	108,587	72,010	66.3	36,577	33.7				
	1976	82,002	45,187	55.1	36,815	44.9	26,823	37.2	26,585	24.5
Atlanta	1968	111,227	42,506	38.2	68,721	61.8				
	1976	82,480	9,231	11.2	73,199	88.8	33,275	78.3	28,747	25.8
San Diego	1968	128,414	98,163	76.1	30,751	23.9				
	1976	121,423	80,153	66.0	41,270	34.0	18,010	18.3	7,491	5.8
Denver	1968	96,577	63,398	65.6	33,179	34.4				
	1976	75,237	36,539	48.6	38,698	51.4	26,859	42.4	21,340	22.1
Boston	1968	94,174	64,500	68.5	29,674	31.5				
	1976	76,889	34,561	45.0	42,328	55.0	29,939	46.4	17,285	18.4
San Francisco	1968	94,154	38,824	41.2	55,330	58.8				
	1976	65,255	14,958	22.9	50,297	77.1	23,866	61.5	28,899	30.7
Seattle	1968	94,025	77,293	82.2	16,732	17.8				
	1976	61,819	41,623	67.3	20,196	32.7	35,670	46.1	32,206	34.3
Nashville	1968	93,720	71,039	75.8	22,681	24.2				
	1976	77,998	54,522	69.9	23,476	30.1	16,517	23.3	15,722	16.8
Cincinnati	1968	86,807	49,231	56.7	37,576	43.3				
	1976	65,635	30,697	46.8	31,938	53.2	18,534	37.6	21,172	24.4
San Antonio	1968	79,353	21,310	26.9	58,043	73.1				
	1976	65,712	9,962	15.1	55,750	84.9	11,348	53.3	13,641	17.2
Pittsburgh	1968	76,628	46,005	60.3	30,263	39.7				
	1976	59,022	31,954	54.1	27,068	45.9	14,051	30.5	17,606	23.0
Kansas City	1968	74,202	39,510	53.2	34,692	46.8				
	1976	51,047	17,560	34.4	33,487	65.6	21,950	44.4	23,155	31.2

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[1] Source: Prepared by the author for a conference sponsored by the National Institute of Education and the Hudson Institute (September 15-16, 1977).

[2] Two big cities—Phoenix and San Jose—are not included because both have numerous districts not coextensive with the city's boundaries. Both are predominantly white.

[3] Includes blacks, Hispanics, Asians, and American Indians.

white withdrawal from city schools, but it is very likely a contributing factor—and, at least in Boston, an important contributing factor. Just as it is impossible to determine whether it is the direct cause, it is equally impossible to prove that it has no bearing at all on family decisions to remove children from urban schools.

BEHIND the controversy over Coleman's findings is a struggle over the future direction of policy. Coleman is urging a cautious and deliberate approach that takes into account the possibility of "white flight" and resegregation. His views, furthermore, support the idea that court remedies should be specific, rather than broad and system-wide.

Coleman's critics are committed to racial balancing of pupil populations as the best, most demonstrable assurance of full integration. The integration forces may not have won every court battle, but they have succeeded in popularizing the notion that every black school, regardless of the reason for its racial concentration, is a segregated school, the result of official discrimination rather than affinity or choice. In the aftermath of the Supreme Court's 1974 Detroit decision, which limited urban-suburban busing, integration advocates, in many instances, have had to confine their demands for busing to individual school districts. In our largest cities, this is not a solution likely to satisfy anyone for very long: "Success" in most big cities will mean a school system in which every school is predominantly non-white, and from which white pupils continue to leave every year. Unless "white flight" is stopped or reversed, racial balancing within cities will very likely produce the phenomenon of resegregation between city and suburb that Coleman has warned about.

The inadequacy of racial balancing within big-city school districts is likely to generate new pressures for metropolitan-area school integration. This is a proposal long favored by the United States Civil Rights Commission and civil rights groups, and it is already in effect in several smaller cities and counties. How such a proposal might be implemented in a city school district with a quarter-million, a half-million, or a million pupils is uncertain, as are the educational implications. What is predictable, however, is the political reaction: To date, no metropolitan region has voluntarily adopted a full city-suburban merger for school integration, and opposition can be anticipated from suburban districts (whose residents include many who fled the city schools), state legislatures (where urban interests are a minority), and Congress (which regularly passes ineffective busing curbs). Nothing less than a reversal of the Supreme Court's 1974 Detroit decision could produce the enforcement mechanism to impose metropolitan-area integration on a large scale. For now, at least, that is not in the offing.

But if racial balancing is of limited practicality because of the diminishing number of white pupils in most big cities, and if metropolitan cross-busing is of limited applicability because of the Supreme Court's 1974 ruling, what then? Few urban districts have had the capacity to look or plan beyond the latest political or fiscal crisis. but clearly some fresh synthesis is needed to restore a sense of direction to urban education. Atlanta is one city that offers hope of a new approach. Its schools are 90-percent black, and its professional leadership is predominantly black. At the instigation of the local NAACP (which defied the national NAACP), a deal was struck in court to forego busing in exchange for jobs and black control of the system. Now the system is intent on demonstrating that the schools can be made to work.

The Atlanta schools are stressing the kind of curriculum and values that will enable black children (and white children) to succeed in the mainstream of American life; this means an early emphasis on basic skills, taught in an orderly atmosphere in which achievement and hard work are rewarded. Atlanta has decided to build a new high school, and remarkably, it will be a selective, admission-by-academic-examination school, possibly the first new such school anywhere in the country for many years.

Meanwhile, the American Civil Liberties Union is pressing a court suit to compel the merger of the Atlanta school district and the surrounding white suburban districts, in order to make blacks a minority within a predominantly white metropolitan district; not surprisingly, the Atlanta district has shown no interest in surrendering its independence. The theory of Atlanta's educational leaders is that equal educational opportunity can be achieved through quality education. If they are right, and if they can create the kind of productive, effective schools that all parents want, their system could become a showplace for urban American schools and a magnet pulling back the children of those who fled the city during the past two decades. Andrew Young, while he was Atlanta's Congressman, predicted in a newspaper interview in 1975 that Atlanta's schools would ultimately prove to be better than the suburban schools, both because of their clear and purposeful educational approach and because of the city's considerable cultural resources, which no suburban shopping mall can match. Imagine that: "white flight" *to* the city, resulting not from coercion or condescension, but from an earnest search for good public schools.

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SOCIAL SCIENCE AND SOCIAL POLICY

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A Response to "The 'White Flight' Controversy"

Diane Ravitch's article, "The 'White Flight' Controversy," in the Spring issue of *The Public Interest* includes many misleading and inaccurate points which need to be corrected. It is also almost two years out of date. I would like to emphasize at the outset, however, that her central argument with regard to Coleman's work is correct. Despite all of the methodological critiques, competing analyses, and reanalyses, the major argument of the Coleman, Kelly, and Moore study, "Trends in School Segregation, 1968-73," has been substantiated empirically by the most recent works. My own updated and expanded study, "Assessing the Unintended Impacts of Public Policy: School Desegregation and Resegregation," (now including Southern school districts and data through Fall 1975), as well as recent works by Farley, Armor, Roberts, and Clotfelter, suggests that the implementation of a school desegregation plan, *if* it involves the busing of whites to black schools, significantly increases the decline in white public school enrollment in the year of implementation—averaging out to be a doubling of the "normal" white enrollment decline in the North and a tripling in the South. Although Ravitch scorns the suggestion in my first study that there appear to be less-than-normal white enrollment losses in post-implementation years, Coleman and his colleagues also found the same effect. Indeed, of the four most recent studies which have examined this phenomenon longitudinally, three have found strong "positive" effects after implementation. At the end of four years, the net effect of school desegregation on white public school enrollment is "non-negative" for most school districts and most plans. If she is going to criticize me for this finding, she should be fair enough to mention Coleman's similar finding.

In her criticisms of my first study, as well as in her own presentation of white enrollment data, Ravitch does not seem to understand social science research methods. In order to detect the impact of a policy on a phenomenon being studied (for example, the impact of a job-training program on unemployment rates or the impact of income redistribution schemes on the level of poverty), it is necessary to isolate the long-term trend from the impact of the public policy. The failure to do this is the most common mistake made by journalists, and it is precisely the error Ravitch has made both in her critique of my study and in her own "analysis." To use an analogy: No scientist of any merit would attempt to determine the effect of a daily vitamin pill on a normal child's growth by measuring his or her height at one point in time and then again several years later, attributing the observed growth to the daily vitamin pill. Yet that is exactly what Ravitch has done.

Although Ravitch refers to my statistical method throughout her article, she does not even discuss the actual statistical method I used —the interrupted time series with a non-equivalent control group— and falsely implies that I simply examined change in percentage white intuitively. Nobody trained in social science research methods would make such an egregious error. In reality, her only criticism of my study is of the way in which I measured white enrollment change, not of my statistical method. To measure white enrollment change I used change in percentage white, rather than proportional change in white enrollment, because I thought it might control for historical accidents, such as the closing of factories and subsequent unemployment which would cause both blacks and whites to move out of the city but would not change racial proportions. As it turns out, this was unnecessary and I now use proportional change in white enrollment as my dependent variable.

Nevertheless, my earlier study was not wrong because I used a measure of white enrollment change that has smaller units than the one Ravitch suggests I should have used. My conclusions were based on a test of significance (of the change in proportion white with desegregation, when compared to the pre-desegregation trend) and comparison with a control group. Since all cases and points in time are in the same units, changing the size of these units makes little or no difference in my findings because the *comparative* relationships remain the same.

Let me demonstrate with the six desegregated school districts Ravitch pulled out of my 86-city study (Table I). Column A shows the significance of the Mood test using the dependent variable I am

TABLE I. *Comparison of Significance of Mood Test Using Differing Dependent Variables*[1]

	Column A	*Column B*
CITY	SIGNIFICANCE OF CHANGE IN PROPORTION WHITE WITH DESEGREGATION FROM PRE-DESEGREGATION TREND	SIGNIFICANCE OF PROPORTIONAL CHANGE IN WHITE ENROLLMENT WITH DESEGREGATION FROM PRE-DESEGREGATION TREND
Pontiac	Significant (.05 or better)	Significant
Berkeley	N.S.	Significant
San Francisco	N.S.	N.S.
Denver	N.S.	N.S.
Pasadena	Significant	Significant
Boston	Significant	Significant

[1] Source: Author's calculations.

accused of using to minimize the effect of desegregation. Column B shows the significance of the Mood test using the dependent variable Ravitch argues I should have used so that I would have seen the real effect of desegregation. These results indicate that the use of one dependent variable rather than the other has changed the results for only one case, Berkeley, a small, atypical, university town.

We can more clearly see the relative importance of these two variables by examining multiple-regression equations analyzing data from my updated and expanded study. These are shown below in a simple equation using variables implicitly controlled for in the interrupted time series.

TABLE II. *Effects of Differing Dependent Variables on Multiple-Regression Equations*[1]

INDEPENDENT VARIABLES	CHANGE IN PROPORTION WHITE WITH DESEGREGATION	PROPORTIONAL CHANGE IN WHITE ENROLLMENT WITH DESEGREGATION
	Beta	*Beta*
Percent Black	-.23[2]	-.57[2]
Southern City School District	-.10	-.15
Unemployment Rate	-.22[2]	-.15[2]
Crime Rate	-.04	-.10
Proportion Students Reassigned (Deseg.)	-.54[2]	-.39[2]
r^2	.36	.53
Observations	109	109

[1] Source: Derived from author's study "Assessing the Unintended Impacts of Public Policy: School Desegregation and Resegregation."

[2] F ratio–significant at .01 levels.

Thus even in the updated study using a different methodology the use of one dependent variable, rather than the other, makes no difference in a finding of a signficant relationship. Had a significant relationship between desegregation and white enrollment change existed in my sample (Northern districts only) and during the time period studied (through Fall 1972), I would have found it regardless of the dependent variable used. Thus when Ravitch states, "Rossell has selected a statistical method that will show small declines even in the face of large absolute movements," she would be correct only if I had intuitively examined the data as she did.

—Christine H. Rossell

Diane Ravitch replies:

In my article, I sought to show the nature of the response to James Coleman's finding that court-ordered desegregation, under certain circumstances, was accelerating "white flight" from large-city schools. Proponents of busing, instead of addressing the problem Coleman raised, attacked him and his work. I examined in detail Christine H. Rossell's "School Desegregation and White Flight," which appeared in *Political Science Quarterly* (Winter

1975-76), because it was widely cited as the definitive refutation of Coleman's thesis. Rossell's major conclusion was that "school desegregation causes little or no significant white flight, even when it is court ordered and implemented in large cities," and she held that her data "contradict almost every claim Coleman has made regarding school desegregation and white flight."

One beneficial consequence of Rossell's letter is that the central issue in my article is now settled: Rossell agrees that Coleman's controversial study "Trends in School Segregation, 1968-73" was substantially correct. This is a useful development, because I have found that there is a widespread belief, inside and outside the academic community, that Coleman's work on "white flight" had been thoroughly discredited. Now Rossell acknowledges that "the implementation of a school desegregation plan, *if* it involves the busing of whites to black schools, significantly increases the decline in white public school enrollment in the year of implementation. . . ." Thus, there no longer is disagreement between Rossell and Coleman on this key point, and that issue can be laid to rest.

But, having retracted the major conclusion of her 1975-76 article, she excoriates me because, first, I should have known that she had revised her views, and second, I criticized the way she arrived at her erroneous conclusion. I learned of Rossell's changed views from three unpublished manuscripts that she sent me after the appearance of my article; the one she mentions, "Assessing the Unintended Impacts of Public Policy: School Desegregation and Resegregation," did not become publicly available until August or September of 1978. Had I written my article in the Fall of 1978 instead of the Fall of 1977, I would have known and noted that Rossell had come to agree with Coleman that school desegregation, under certain conditions, increases "white flight." But even so, her original article would still have been an appropriate illustration of the response to Coleman.

As to methodology, my chief criticism was that Rossell measured white enrollment change by looking at change in *percentage* white on a yearly basis (she notes, correctly, that I made no reference to her *method*—the interrupted time series with a non-equivalent control group). As I argued, the change in percentage white can be misleading. When minority enrollment is growing while white enrollment is fairly stable, as it was in Boston in the 1960's, the percentage of white students drops even though no "white flight" exists; when "white flight" did occur in Boston during the implementation years, it appeared to be merely a continuation of a long-term trend, rather than a significant movement. Furthermore, the choice of this particular measure systematically understates the extent of "white flight" where it does exist, and this may be one reason why Rossell could find little or no significant "white flight" in her early work. The criticism must not be entirely irrelevant, because Rossell notes in her letter that she no longer uses change in percentage white as her dependent variable but has adopted proportional change in white enrollment.

My doubts about Rossell's assertion that "white flight" rarely occurs after the imposition of citywide desegregation are sustained by her latest study. According to Rossell, the greatest "white flight" occurs in the year of implementation. When those who object most to the desegregation plan have left, "white flight" diminishes. In districts that are less than 35 percent black, white enrollment losses return to the pre-desegregation rate or even lower, while in districts that are more than 35 percent black, "white flight" *continues* in the years after implementation (at a rate less than the peak of the implementation year). Where we differ is in the implications of this finding. Rossell sees the eventual slackening of "white flight" after desegregation as an indication that citywide racial balancing may be a good strategy for guaranteeing racial stability in American cities; additionally, she concludes in her latest study that "all school desegregation plans show a net benefit in interracial contact, and paradoxically this benefit is greatest in school districts at or above 35 percent black despite the fact that these are the school districts with the greatest white enrollment loss." But I am concerned that citywide racial balancing in a big-city district that is already predominantly non-white (and most big-city districts are at least 35 percent black) may leave few white students to integrate. Ultimately, then, the issue in the "white flight" controversy is not one of technique but of social policy, where reasonable people may disagree.

David J. Armor comments:

Diane Ravitch's review of the "white flight" controversy underscores the perils faced by researchers who question the efficacy of desegregation policy. The attack by certain social scientists and educators on Coleman's "white flight" report was of a ferocity unprecedented in the treatment of a scientist of Coleman's stature. What is especially noteworthy, as Ravitch brings out, is that none of these well-publicized critiques—which pounced on Coleman's alleged methodological mistakes—presented anywhere near as careful an analysis of the "white flight" phenomenon as did Coleman. For example, while Coleman's analysis shows that the "white flight" effect is substantial only when desegregation is accompanied by several conditions, such as large district size, a high percentage of black enrollment, and availability of white suburbs, none of the major counter-studies by Reynolds Farley, Christine Rossell, and Thomas Pettigrew and Robert Green attempted to control for these crucial factors.

What Ravitch does not mention, however, is that later and more detailed analyses by both Farley and Rossell yielded results quite consistent with Coleman's. (Farley's paper was presented at the American Sociological Association meetings in September 1976, and Rossell's first presentation was at a Boston University symposium in April 1976.) It is to their credit that both Farley and Rossell have admitted, publicly, that Coleman's original findings are essentially correct (Pettigrew and Green, whose critique relied heavily upon the original Farley and Rossell studies, have not been heard from.) On the other hand, neither of these two newer reanalyses has been circulated beyond specialist circles or published, so perhaps Ravitch cannot be faulted for failing to cite them. The important question is why none of the agencies who expedited publication of the early critiques--the National Institute for Education, the Brookings Institution, the *Harvard Educational Review*, the *Political Science Quarterly*—has been anxious to get the word out on these latest studies. The failure to do so prolongs confusion and ambiguity as to the actual state of social science on this issue. Worse, it raises the question of whether these agencies, entrusted with accumulating and promulgating objective scientific knowledge, are in fact bending to political pressures or ideological preferences.

A more important difficulty with the Ravitch review is her presentation of eight-year white-loss data in the 29 largest cities. A careful reading reveals that Ravitch does not claim all of these losses are due to busing; she acknowledges that some of the losses are due to other factors associated with declining white populations in urban centers. However, this type of data is frequently misunderstood, since many commentators have confused total white losses with the "white flight" due to busing. Coleman's report evaluated the effects of desegregation per se, above and beyond losses caused by other factors. In order to do so, it is crucial to separate losses due to desegregation from losses due to declining white births and outmigration arising from events unrelated to desegregation.

Since the Ravitch review may well raise many questions about the true magnitude of busing effects, it might be useful to summarize the results of a new study of "white flight." (See David J. Armor, *White Flight, Demographic Transition, and the Future of School Desegregation*. The Rand Corporation. P-5931. August 1978.) This study focuses specifically on court-ordered *mandatory* desegregation in larger school districts (over 20,000 students) with a significant minority enrollment (over 10 percent). It seems relatively well-documented that "white flight" is not accelerated in districts adopting voluntary desegregation plans, nor in districts with a very small proportion of minority students. The issue of district size is somewhat more complex, but certainly the larger districts raise the more important policy implications, since they encompass the vast majority of black students. The reason for singling out court-ordered cases is that they raise the most likely conditions for "white flight." Rossell's recent studies have shown that the number of white students reassigned (or bused) seems to be the crucial determinant of "white flight," but in fact this rarely happens to any significant degree without a court order. A court action also signifies considerable community opposition to certain types of desegregation, expressed through the elected school board.

The unique feature of this new study is that it attempts to pin down the total long-term effects of court-ordered mandatory busing by using a demographic projection technique to estimate what the white enrollment would have been in the absence of desegregation. While the original paper should be consulted for details about methodology, it suffices to say that the technique uses actual white births and pre-desegregation white outmigration rates (from census data) to project the school-age population. From this projection, the "natural" rate of white enrollment decline can be estimated. Like Coleman and the later Farley and Rossell studies, my study concludes that the "white flight" effect is strong in most court-ordered districts that have more than 20 percent minority students and available white suburbs.

The first important finding is that there is a substantial anticipatory effect the year *before* the start of desegregation, with the actual rate of white loss more than double the projected rate. This finding makes one of Rossell's methods, which predicts post-desegregation loss rates from pre-desegregation rates, very hazardous indeed, with a likely underestimation of "white flight." Second, the first-year effect is truly massive, with a loss rate four times higher than it would have been without desegregation. Finally, according to my findings the long-term effects are also substantial, with actual white losses still nearly twice the natural losses four years after the start of desegregation.

The effect of accelerated white losses on "resegregation" is substantial in most of these cases. In a majority of these school districts, more than half of the total white loss over periods of seven to eight years is attributable to desegregation events. Further, in many instances the effect of court-ordered desegregation is to speed up the "tipping" process, whereby a district becomes predominately minority; in a few cases, such as Boston and Denver, it is possible that the districts would not have tipped at all without the court orders.

There is no question that some experts will question these findings on the size and duration of "white flight" effects; all methods for determining desegregation effects must make assumptions, and while mine seem reasonable, they can be challenged. In fact, I agree with Ravitch that we will never know with certainty the precise impact of these court actions on white losses.

Nonetheless, debates over methodology must not be allowed to obscure the central policy issue. Most of the school districts I have studied are losing whites at a rapid rate. While part of the cause is demographic, the court action only increases the risk of "resegregation." For persons who sincerely desire to increase the total amount of integration, this risk has to be disturbing. At precisely a time when policies are needed to halt or reverse the normal white declines in urban areas, we have instead court actions which are exacerbating the condition. Although the effects may be relatively small in some cases, in other cases they are large. In either case they seem inappropriate during an era when most urban experts are urgently seeking ways to attract whites back into cities. Clearly, other school desegregation remedies must be considered.

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Forced Busing and White Flight

New school study seems to link them closer than ever

David Armor

Back in 1975, Chicago Sociologist James Coleman, having looked at the early figures, felt called upon to report what most Americans thought they knew already: court-ordered busing to achieve racial balance in large U.S. cities and to ensure that more blacks and whites go to school together was causing a great deal of white flight from city schools.

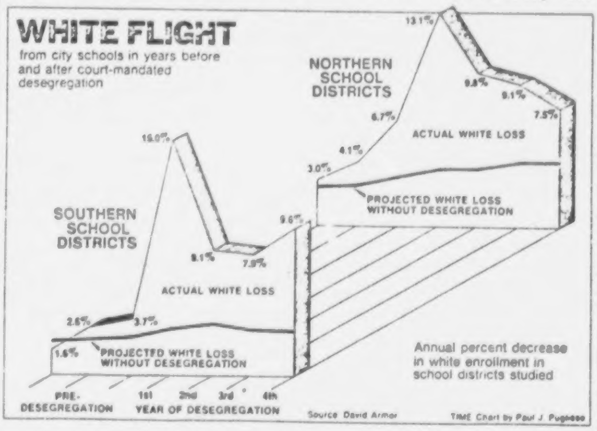
If the finding came as no great surprise, its source was a considerable shock. Coleman was the man whose 1966 report, *Equality of Educational Opportunity*, had served as the main academic proof of the values of desegregation. Yet here he was, questioning the usefulness of busing. Coleman, of course, was merely asking whether, in the long run, "forced busing might not defeat the purpose of increasing overall contact among races in schools."

To many people, though, the question seemed virtually un-American. For months sociologists kept busy stomping all over Coleman's findings. His conclusions were premature, they said. There was no hard proof that white flight from city schools, already a phenomenon before the threat of busing, was significantly increased by busing. And even if such a connection might one day be proved, the condition was likely to be short-lived. In any case it would take years to measure the matter adequately. Three years have passed. Now comes a new study that has the advantage of being able to see the effects of busing in a slightly longer perspective. Produced by Harvard-trained David Armor, 39, a senior sociologist at the Rand Corp., the report seems to bear out many of Coleman's early fears.

Armor measured white flight over a six-year period in 23 Northern and Southern cities that had court-ordered mandatory busing. They also had accessible suburbs, school districts with an enrollment of at least 20,000 students and a large minority population (more than 20%). Then he compared his figures with a projected loss of white students that would have taken place without forced busing, based on established demographic patterns of white exodus and predictable birth rates. The results were remarkably consistent.

Against a projected white-student loss without busing that varies roughly between 2% and 4% over the six-year period, the average rate of real white loss quickly rose toward 15% for the first year of busing, then dropped some, to about 7% to 9%, during the next three years. Predictably, the highest rates of white loss occurred in districts where large numbers of whites were forced to bus into predominantly nonwhite schools. "The size of the flight is both large and long-term," Armor concludes, and he estimates that 30% to 60% of it is due to forced busing.

Critics have already begun finding fault with Armor. He has been taken to task for not running more comparative studies in districts where results proved favorable to busing. He has been accused of exaggerating the influence of busing on white flight. His most significant contribution, the projection of white-flight levels likely to occur without busing, has been challenged. Above all, he has been reminded that the problem is complex, that nobody can tell how long white-flight loss percentages will stay high.



Source: David Armor

TIME Chart by Paul J. Pugliese

Nonetheless, there is now considerable academic consensus that in large cities a significant linkage exists between white flight and forced busing. The fact that sociologists show signs of catching up with everybody else's common-sense observation should be reassuring. But in the spectrum of hope for improving the education of minorities and for guaranteeing constitutional rights that have been violated for a century, Armor's report is depressing. Finding forced busing counterproductive, at least in inner cities, he offers evaluations of alternative measures.

The first is the "metropolitan plan," which tries to block white flight by incorporating suburbs under city control, then busing whites back into town to achieve balance. The courts have struck down such plans in Detroit and Richmond. Armor adds another glum note. After studying inconclusive results of the one metropolitan-integration plan tried so far, in Louisville, he says it does not seem to work. Whites, denied escape to near suburbs, move farther away, or flee into private schools. Even in sprawling Los Angeles, where Armor thinks some sort of metropolitan plan should be instituted and might work, the chances of getting approval seem small.

Armor has often testified in court hearings about mandatory busing plans. His personal hope for further progress boils down to a mixture of mandated school improvements—for instance, a court-ordered increase in the number of "magnet" schools to draw qualified whites and blacks from all corners of a city—and vigorously promoted voluntary school integration. The only hopeful example he gives, however, is San Diego. Using a voluntary system, the city has kept the level of white flight down (below 6% per year). But the increase in the actual number of whites and nonwhites going to school together—the real aim of integration—has been small. A similar failure to achieve much actual integration occurs in many forced-busing cities, as Armor keeps pointing out, but at a much greater cost in pain, dislocation and plain cash.

Perhaps significantly, Armor does not confront a fact that most parents, blacks especially, need no sociologist to remind them of. Without the constant threat of busing and the steady prodding of the courts, the amount of "voluntary" school integration in San Diego and elsewhere would probably have never occurred. ■

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[From the Washington Star, Dec. 10, 1980]

A PLAN TO END BUSING

(By William F. Buckley)

Further on the matter of a program for the Reagan administration. Consider: forced busing.

A brief synopsis. The Supreme Court ruled, in the *Brown* decision of 1954, that statutory segregation of schools was unconstitutional. The decision was for a decade or more interpreted as outlawing segregation. But when the various civil rights bills were passed, the courts interpreted them as, in effect, decreeing desegregation. Now, segregation, under *Brown*, was by this point acknowledged as unconstitutional where 1) decreed by state law; or 2) contrived by busing. In desegregated areas, in short, it was clearly illegal to round up black students in order to send them to another school.

But the courts took that and ran with it. What they have been saying now, for 10 years or so, is that if a school is primarily white or primarily black, the school district has the responsibility of finding students of complementary race, and shipping them in, so as to assure that schools are biracial.

Now, although the polls show that forced busing is unpopular with whites and with blacks, many black leaders interpret the call to end forced busing as motivated primarily by a surreptitious anxiety to resegregate; and the issue has, unhappily, drifted over toward ideological divisions.

But how might a Reagan administration confront the matter pragmatically?

1) Mr. Reagan should recommend to Congress that it pass a bill removing from the federal courts, effective immediately, jurisdiction over the racial composition of all schools.

A CONSTITUTIONAL AMENDMENT

2) Mr. Reagan should recommend to Congress a constitutional amendment outlawing the use of any racial discrimination in the public schools. In doing so, Congress and the states would, in effect, find themselves revalidating the edict of the Supreme Court in the *Brown* decision. Moreover, the amendment would harmonize with crystallizing philosophical opinion that to encourage, indeed to prescribe, racial standards in the composition of the schools is to underwrite a form of racism which however benevolent the intention, writes into law inequality by reason of race.

The advantage here to the Reagan administration is: 1) instant relief from juridical interference with parental authority, combined with 2) the opportunity, over a considerable period, for the states to mediate whether they wish to affirm racial equality by constitutional action.

If, during the first year or two or three that the proposed constitutional amendment is making the rounds, the public experience is that segregationists have discovered loopholes the effect of which is to deny biracial education where residential patterns make this logical—then the constitutional amendment can fail for insufficient support in the states; and Congress can return to the courts the authority it took from them.

The other possibility is that a) predominantly white schools will improve; b) predominantly black schools will improve; and c) more biracial education will result from the cessation of that flight from the public schools so notorious in the nation's capital. Moreover, the release of racial tension brought on by the congressional initiative could test the suspicion, for which there is considerable scholarly evidence, that busing has in fact enhanced racial friction rather than racial understanding. But once again, President Reagan would be in a position to say: Let's try it. Let's see what happens.

[From the Washington Star, Dec. 1, 1980]

THE MESSAGE IS LOUD: END RACIAL BUSING

(By James J. Kilpatrick)

Solid majorities in both the House and the Senate have been doing their best to send the federal courts a message on racial-balance busing. Regardless of what happens in the pending appropriations bill for the Justice Department, sooner or later that message will be emphatically delivered.

What the Congress is saying, loud and clear, is that the people are fed up with this evil and futile business. If the message from the expiring 96th Congress does not get through, be assured that the incoming 97th Congress will shout it out. And an incoming President will join in the cry.

This is where we stand on racial balance busing: Both houses have agreed to language that would prohibit the Justice Department from using public funds "to bring any sort of action to require directly or indirectly the transportation of any student to a school other than the school which is nearest the student's home." An exception is made for handicapped children.

PRACTICAL EFFECT

In one sense, to be sure, there is less to this amendment than meets the eye. The language would not prevent private litigants, such as the National Association for the Advancement of Colored People, from petitioning for a busing order. The language would not prevent a district judge from imposing such an order on his own. The only practical effect would be to halt the Justice Department from advocating forced busing as the government's choice of desegregation remedies.

During the course of Senate debate, Connecticut's Lowell Weicker made the absurd argument that it is no business of the Congress to speak to judges. "Why should Congress interpose itself in the judicial process?" he demanded.

The short answer is that Congress, not the courts, holds the power of the purse, and Congress, not the courts, has power to pass appropriate legislation to enforce terms of the 14th Amendment. The anti-busing provision is fully within the constitutional powers of the legislative branch.

Beyond this, the provision expresses sound public policy. Ultraliberals and other social engineers are fond of saying airily that there is nothing new about "busing." After all, before courts began issuing their busing orders, 10 million children already were riding buses to school every day. The contention is specious. In the old days children were bused to get them to school. Today millions of children are being forced into buses for another reason entirely—to achieve an arbitrary racial balance.

Such busing is morally wrong. To cart children around a city solely because of the color of their skins is racism, blatant and overt racism, precisely as evil as the racially segregated busing of 26 years ago.

Such busing if educationally wrong. No convincing evidence yet has been produced to show that busing helps black children as a group. The findings of Dr. James S. Coleman, who once was an advocate of this remedy, have caused him to back away from the optimistic predictions he made in 1966.

Racial-balance busing adds to disciplinary problems; It makes the involvement of parents more difficult; it diminishes public support for public schools; and it diverts large public sums from the business of teaching.

There is overwhelming evidence that court-ordered busing, in the end, simply does not work. Justice is blind, they say, and surely federal judges are blind to reality when they suppose they can reorder the lives of unoffending families by judicial fiat. Judges may work all night to fashion decrees, school by school, intended to put precisely 50.3 percent white skins and 49.7 percent black skins in a classroom, but the skins will not stay put.

In city after city, the phenomenon of "resegregation" swiftly has developed. Dismayed by disciplinary problems, both white and black familes flee the public schools. Enrollments drop, and everything—parents, children, schools and communities—often is worse off then before.

Through his attorney general, President Carter has indicated he will veto the Justice appropriations bill. Let him. He has the power to do so. But in one form or another, the message will return.

[From the Washington Post, Mar. 24, 1981]

DESEGREGATION IS THE WAY OUT

(Michael Meyers and James I. Meyerson)[1]

A more emotional topic than desegregation of the public schools is hard to find unless it is racial integration of the schools. Unfortunately, too many people confuse the two, and have difficulties in advancing either in practice.

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[1] Mr. Meyers is assistant director and Mr. Meyerson is assistant general counsel of the National Association for the Advancement of Colored People.

Integration, the idea of blacks, whites and Hispanics living and working in close proximity and going to school together, at least in theory, sounds good. Certainly our public officials give lip service to integration as a desirable goal. In practice, however, they too often frustrate, delay or impede deliberate efforts to promote desegregation of schools, the prelude to integration. They openly oppose busing, rezoning and student reassignments introduced to achieve a unitary school system on the pretext that "desegregation is not the answer."

Of course, desegregation is not the answer to America's racial problems, but it is the remedy to purposeful racial segregation in that it brings blacks and whites together into a single school or system. Desegregation, therefore, is the beginning, not the end, of a process designed to move into integration. If the emotions of those who wish to perpetuate segregation are allowed to prevail, if public officials respond in a way that panders to the fears and prejudices of white adherents to a racially structured school system, then desegregation will fail and integration will be impossible.

One of the deep problems associated with the effort to desegregate schools, and underlying the resistance to integration, is that many whites object to any change in their life patterns. They define entire neighborhoods as "theirs" and latch on to majority white schools in increasingly black cities as their last refuge before fleeing. With unbridled tongues, they state their intentions to move away from black people should blacks "take over" by challenging the racial status quo.

In a real sense, segregation and isolation have taught white people and white children how to be ignorant, and how to distort and pervert the American principles of democratic education, legality and morality. They really believe that no law has validity that requires them to give up their self-proclaimed superior status in a community. They cling to their deceptive isolation all the while judging others to be mediocre or undeserving of the privileges they seek to preserve for themselves. Their racial prejudice leads them to the delusion that all whites, no matter what their real status, come from 100 percent high-class homes and that others are dangerous to associate and go to school with. Thus, segregation, whatever the qualitative similarities in facilities or services to a particular school or community, perpetuates caste as the overriding and major focus of life.

An NAACP attorney, in explaining our efforts to dismantle racially organized schools, where whites seek to impose their racism on black children, said that "one does not feed sugar to a cavity." In other words, we may not offer whites who are opposed to desegregation sugar-coated encouragement by assuring them that their cause is just but the laws are wrong. That kind of bland apology for pursuing desegregation only accommodates the basest prejudices of the resisters; it does not offer anything more than palliatives and fuel for open resistance. Ultimately, it precludes the attainment of a truly integrated society where racism is eliminated root and branch.

There are good and compelling reasons for insisting on desegregation and pursuing integrated education. Elimination of the system of racial caste is central and fundamental to any genuinely democratic society. Rejecting the pernicious normative racist behavior of public institutions and officials is of paramount interest to a society concerned with freedom and justice. Freeing our people, black and white, of superstitions about one another should be not only a legal assignment but also a moral imperative in a society that respects equality. Moreover, we pursue desegregation because there can be no compromise with racism.

Racism is a complex, difficult, tenacious reality in American life that requires an enormous commitment of will, energy and resources to overcome. Fortunately, there are increasing numbers of people, black and white, in and out of government, who are working toward this end. The purpose of this struggle is a single, truly egalitarian society, which will never be achieved if we cooperate with racism's conventions.

No informed citizen can respect fraudulent appeals for "neighborhood schools" that promise merely to reflect and perpetuate racial divisions in society. Desegregation is the way out, and the core of a program for the enrichment of our nation.

[From the Washington Post, Sept. 4, 1981]

WHY IS BUSING THE ONLY ROUTE?

(By William Raspberry)

The NAACP, unhappy with the results of nearly a decade of court-ordered busing in Prince George's County, has asked the court to reopen the original case.

The civil rights organization's contention will be that the county has not done all it could to maximize racial integration in the public schools. It obviously has not, though officials no doubt will contend they have done all the law required them to do in that regard. They drew up bus routes and pupil-assignment plans that, at least at the beginning, had the effect of ending official segregation.

A couple of things have happened since the plan was implemented in 1972. First, a large number of whites have left the public schools while a large number of black families have moved into the county, most of them in areas near the District of Columbia. Second, housing patterns in 1981 are not what they were in 1972. Whites have been moving farther out into the county, in many cases selling their homes to black newcomers.

The school system that was 13 percent black a decade ago is some 40 percent black today. One result of all this is that the busing patterns that enhanced integration when they were established now often involve the absurd phenomenon of black children traveling great distances from their neighborhood only to wind up in schools that are overwhelmingly black.

It may be fair to ask whether the county has done as much as possible to maximize racial integration. Clearly, it hasn't. But the suspicion here is that that is the wrong question. The relevant inquiry is whether anyone—including the NAACP—has done as much as possible to improve the education of black children.

There are other questions, but this one is key. For instance, the NAACP has questions regarding possible discrimination in hiring and assigning black teachers. In my opinion, that is a proper issue for the teachers themselves, but it has little to do with the question of educating black children, or of busing, for that matter. Indeed, if black teachers are being assigned disproprotionately to black schools, that ought to enhance the education of black children—unless it is assumed that black teachers are either less qualified than whites or less concerned about the education of black children.

There is the question of whether school-closing decisions have been made in a way calculated to reduce the amount of racial integration, a charge which, if true, might prove to be the most effective lever for reopening the busing case.

There is the question of discrimination against black children, even when they attend integrated schools. The NAACP points out, for instance, that black children make up 67 percent of the "educable mentally retarded" and 61 percent of the children identified as having "specific learning disabilities." Black students, says NAACP general counsel Thomas I. Atkins, "are being disciplined for things that would be disregarded or given less discipline for whites." So why does Atkins work so feverishly to expose more black children to such disparate treatment?

There may even be a question of the equitable distribution of resources—the question that resulted in the busing order in the first place. But if that remains a problem, it strikes me that it can be resolved far more easily than by transferring pupils.

The NAACP's single-minded insistence on racial integration resolves none of these questions, and in some cases—the matter of school discipline, for instance—aggravates them. So why the continuing fervor for busing?

The reason, I suspect, is that the NAACP, seeing clearly the importance of better education for black children, is trying to achieve it with the only tool it has at hand: litigation. Litigation works reasonably well in terms of statistical equity. It doesn't work worth a damn for the education of specific black children.

The NAACP thinks it is committed to improving education for black children. What it is really committed to is a specific method—busing—for achieving that end. And it would rather fight its quixotic court battles than switch to a different approach.

I would not argue for a return to the days of separate-but-equal, when black children were transported great distances to keep them from sitting next to white children. But neither would I argue for hauling black children needless miles to keep them from sitting next to other black children. Color isn't the problem; education is.

If the NAACP and its supporters had spent as much of their resources, financial and otherwise, improving the education of black children as has been spent trying to get them into predominantly white schools, the problem would have been solved long ago.

THE PROBLEM IS "FORCED" BUSING

(By D. L. Cuddy)[1]

"You know what? I'm against forced busing, too!" That remark was made by a young intellectual black principal while I was addressing a meeting (in Raleigh, N.C.) of the local Fellows of the George Washington University Institute for Educational Leadership.

The principal's pronouncement was based on the fact that the burden of busing has fallen predominantly on blacks. In a school system where the black-white ratio is 30 to 70, for example, 70 percent of the black students must be bused to achieve racial balance, but only 30 percent of the white students must be bused. And if the purpose of forced busing is to achieve societal integration, increasing numbers of blacks are beginning to wonder if the required movement of their children to integrated schools during the day, and back to segregated neighborhoods at night, isn't becoming a permanent "solution" to the problem of racial discrimination rather than the temporary solution forced busing was originally designed to be.

Decades ago, "freedom of choice" was a slogan used by many whites largely for the purpose of maintaining segregated schools, with black schools usually of inferior quality. To correct this situation, the federal government logically was asked to assist blacks in receiving guaranteed equal educational opportunities. From that request, however, the federal government embarked on a policy that at least tacitly supports the racist view that black students cannot learn unless they are seated next to whites.

As one who attended a racially integrated school in the South in 1952 (two years prior to the Supreme Court's *Brown* decision), and who taught in both predominantly black as well as predominantly white neighborhoods, I can say two things regarding black-white educational relationships. First, in schools where educational excellence rather than social promotion is emphasized, there appears to be less racial discrimination. Second, during my public school teaching career, I had more disciplinary difficulty with spoiled students from affluent neighborhoods than I did with economically deprived, yet educationally motivated, black students in the same school. While the Scholastic Aptitude Test scores for white students have been declining for approximately the past 17 years and many white youths have seemed determined to ruin their lives with drugs, black students whose parents have emphasized educational achievement have had a golden opportunity to excel. From time to time, I meet several of my black former students and now find that one works at the local state university, one at a television station, one is working toward her college degree in psychology, and I believe one is now an officer in the Air Force.

The point here is, that with government protection guaranteeing equal educational opportunities, blacks can perform as well as whites; but neither blacks nor whites want the government to adopt the principle that it can force people to do that which they do not want to do (e.g., forced sterilization, euthanasia). While blacks desire federal protection against discrimination so that they may attend whatever school they wish, go to any public establishment they choose, and live wherever they please, blacks do not want government implementing a policy that, for example, would require the break-up of black neighborhoods forcing the residents against their will to disperse throughout the white community. Blacks as well as whites have pride in their neighborhoods and realize the importance of neighborhood schools.

What of the contention, though, that we live in a world where blacks and whites must live together, and abandonment of forced busing might lead to a return to a segregated, albeit voluntary, society? It should be emphasized here that the problem is not busing, but rather "forced" busing. There is nothing wrong with students voluntarily requesting to be bused to schools outside their neighborhoods. There is nothing wrong with school systems developing districts within which black neighborhoods already exist so that an integrated school system may occur naturally. And although "magnet" schools are undesirable for many because they tend to develop elitist attitudes among students, a majority of the American people might favor instead of forced busing an approach where students of all races voluntarily would choose to attend secondary schools offering programs fitting students' special interests.

Concerning the government's role, it is entirely proper for the government to guarantee that each school receive proportional financial support, and that teachers include all races and be of equivalent ability in each school. There is also nothing wrong with government offering developers incentives to construct housing projects on the outlying growth areas of urban communities that would allow racial representation.

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[1] The writer is an instructor of American history at the University of North Carolina at Chapel Hill.

As indicated earlier, the problem is "forced" busing. And blacks increasingly seem to be voicing their opposition to this apparently permanent federal policy, the burden of which falls predominately on their children and their race.

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LEGAL ANALYSIS OF S. 528, 97TH CONG., 1ST SESS., THE "NEIGHBORHOOD SCHOOL ACT OF 1981"

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May 7, 1981

SUMMARY

This report analyzes the legal and constitutional implications of S. 528, the "Neighborhood School Act of 1981," introduced by Senator Johnston, *et al.*, on February 24, 1981. Section 2 of that bill states that the "neighborhood public school" is "the preferred method of public school attendance and should be employed to the maximum extent consistent with the Constitution of the United States." To implement this congressional policy, §3 imposes certain limits on the authority of the Federal courts to require the transportation of any student beyond the public school "nearest the student's residence" in school desegregation cases. The bill's major restriction would operate to bar the courts from ordering the bus transportation of any student in excess of thirty minutes "total actual daily time" or ten miles "total actual round trip distance" beyond that required for the student's attendance at the "public school closest" to his or her residence. Based on a review of the case law, the report indicates that S. 528 could preclude judicial use of busing remedies heretofore approved by the Supreme Court in *Swann* v. *Board of Education* and its progeny to eliminate *de jure* or unconstitutional segregation from the public schools. This, in turn, raises issues of constitutional dimension related to Congress' power to legislate remedies for equal protection violation under §5 of the Fourteenth Amendment, or to restrict the jurisdiction of the Federal courts pursuant to Article III of the Constitution.

With regard to the §5 issue, the report suggests that, in view of the emphasis in *Katzenbach* v. *Morgan* and *Oregon* v. *Mitchell*, *et al.*, on Congress' superior fact-finding capacity in framing remedies for equal protection violations, the limitations imposed by S. 528 may be entitled to judicial deference, particularly if the findings in §2 of the bill relative to the harms of busing are supported by other evidence adduced in congressional hearings and debate. However, because the bill could be viewed as restricting or abrogating, rather than expanding, a remedy essential to the right to a desegregated education in some cases, and involves the issue of Congress' power *vis a vis* the Federal courts rather than the States as in *Morgan* and *Oregon*, those precedents may not be totally applicable to S. 528. Another possible source of authority for the remedial limits of the bill, as they would apply to the use of busing by the lower Federal courts, may be found in Article III of the Constitution which empowers Congress to "ordain and establish" the inferior Federal courts. The Supreme Court has consistently construed Congress' power over the jurisdiction of the lower Federal courts to be virtually plenary. More problematic, however, is the issue whether Congress' Article III power to make "Exceptions and. . . Regulations. . ." to the Supreme Court's appellate jurisdiction would sanction the statutory withdrawl of Supreme Court authority to order busing remedies to effectuate the right to a desegregated education. Fundamental constitutional considerations related to separation of powers and the Supreme Court's essential function in giving uniformity and national supremacy to Federal law may operate as limitations upon Congress' Article III powers in relation to the appellate jurisdiction of the Supreme Court.

LEGAL ANALYSIS OF S. 528, 97TH CONG., 1ST SESS., THE "NEIGHBORHOOD SCHOOL ACT OF 1981"

INTRODUCTION

On February 24, 1981, Senator Johnston, on behalf of himself and several colleagues, introduced S. 528, the "Neighborhood School Act of 1981," which was referred to the Committee on the Judiciary. That bill would impose certain limits on the power of the Federal courts with respect to the grant of injunctive relief in suits to desegregate the public schools and would authorize the Attorney General to seek judicial enforcement of these limits on behalf of private parties in certain circumstances.

Section 2 of the bill contains a declaration of Congressional findings to wit: that court ordered transportation of students beyond the public school "closest to their residences" has been an "ineffective remedy" frequently resulting in an "exodus" of children and loss of community support for public school systems; that such transportation is "expensive and wasteful of scarce supplies of petroleum fuels;" and that student busing "to achieve racial balance" has been "overused" by the courts, is "educationally unsound," and actually causes racial imbalances in the schools "without constitutional or social justification." Accordingly, §2 concludes by stating that the assignment of children to their "neighborhood public school" is "the preferred method of public school attendance and should be employed to the maximum extent consistent with the Constitution of the United States."

To implement this congressional policy, §3 of the bill would add a new subsection (c) to 28 U.S.C. 1651[1] providing that, except in certain limited circumstances,

> No court of the United States may order or issue any writ ordering directly or indirectly any student to be assigned or to be transported to a public school other than that which is nearest to the student's residence. . .

The bill provides for exceptions to this general limitation on judicial authority where more extensive transportation is required by a student's attendance at a "magnet," vocational, technical, or other specialized instructional program, is related "directly or primarily" to an "educational purpose," or is otherwise "reasonable." However, no such transportation requirement shall be considered reasonable if alternatives less onerous in terms of "time in travel, distance, danger, or inconvenience" are available. The cross-district busing of students would also be deemed unreasonable. Nor would a transportation plan be "reasonable" where it is "likely," presumably because of white flight or otherwise, to aggravate existing "racial imbalance" in a school system, or to have "a net harmful effect on the quality of education in the public school district." Finally, §3 would make it unreasonable, and therefore bar the courts from ordering, the bus transportation of any student that exceeds by thirty minutes or by ten miles the "total actual time" or "total actual round trip distance" required for the student's attendance at the "public school closest" to his or her residence.

1/ This section currently provides:

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Section 4 of the bill would amend Title VI of the 1964 Civil Rights Act[2] to authorize the Attorney General, on complaint by a student or his parent that "he has been required directly or indirectly to attend or to be transported to a public school in violation of the Neighborhood School Act," to initiate a civil action in Federal district court to enforce these limitations. Before instituting such action, the Attorney General must certify that the complaint is meritorious, and that the complainants are unable to maintain an appropriate action for relief. The Attorney General is authorized to implead as defendant such parties as may be necessary to the grant of effective relief.

I.

As is apparent from the bill's preambulatory findings, the basic legislative objective of the proposed act is to, in effect, constitutionalize the "neighborhood school" by imposing strict statutory limits on the power of the Federal courts to order the transportation of any student beyond the "closest" public school to his or her residence in desegregation cases. For purposes of the bill, it is indifferent whether the order or plan is directed to elimination of segregation de jure in origin, that is, that caused by the intentional actions of school officials and traditionally condemned as a violation of the Equal Protection Clause of the Fourteenth Amendment, or de facto and resulting without the complicity of State or local officials. Accordingly, the bill would make attendance at the neighborhood school the preferred method of student assignment, valid for all purposes under Federal law, and would sanction judicial departures from this policy only to the extent that they did not entail an increase beyond prescribed limits, in either the time or distance of travel, over that required for a student's attendance at the school closest to his or her home.

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[2] 42 U.S.C. 2000c et seq.

As such, it would not affect the authority of the courts to enforce remedies in school desegregation cases involving the reassignment between schools or the reformulation of school attendance boundaries which do not place a greater transportation burden on any affected child. Nor would the bill interfere with the use of other commonly employed desegregation remedies, such as voluntary majority to minority transfers, the establishment of "magnet" schools, school closings and new school construction, and the remedial assignment of of faculty and staff. Beyond this, however, the bill may import significant restrictions on Federal authority to impose "affirmative" remedies to redress conditions of State sanctioned segregation violative of equal protection guarantees.

Before proceeding further, however, it should be noted that certain language in the bill could invite a narrow judicial interpretation of the busing limitations with a view to reconciling them with existing authority under the Fourteenth Amendment. For instance, the congressional finding in §2(a)(4) that neighborhood public schools "should be employed to the maximum extent consistent with the Constitution of the United States" (emphasis added) finds a statutory parallel in the Scott-Mansfield amendment to Title II of the 1974 Education Amendments. That provision qualified a restriction on court ordered busing beyond the school "closest or next closest" to the home by stating that nothing in that Act "is intended to modify or diminish the authority of the courts of the United States to enforce fully the Fifth and Fourteenth Amendments to the Constitution of the United States."[2a] Taking a cue from the Scott-Mansfield language, the busing limitations in Title II were subsequently held by the courts not to bind judicial authority in cases involving constitutional violations, that is, where there has been a finding of

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[2a] See, 20 U.S.C. 1702(b).

de jure segregation. Thus, in *Dayton Board of Education* v. *Brinkman*[2b] the Sixth Circuit pointed to the statement of congressional finding in §1702(b) in refusing to adhere to the "next closest school" limitation and ruled that the 1974 Act, taken as a whole, restricted "neither the nature nor scope of the remedy for constitutional violations in the instant case."

Another possible limiting construction is suggested by inclusion in §3 of language that would measure the time and distance limitations on student transportation by comparison to "the public school closest to the student's residence *and with a grade level identical to that of the student*." (emphasis added). During consideration of the fiscal 1977 Labor-HEW appropriations, Congress adopted a provision which, in terms somewhat analogous to the bill, directed HEW that it may not require the transportation of students beyond the school nearest the home "which offers the courses of study pursued by such student" in order to comply with Title VI of the 1964 Civil Rights Act.[2c] Nothwithstanding the explicit prohibitory language of the statute, and contrary indications in the legislative history, the Department of Justice subsequently issued an analysis that Congress did not intend to prohibit HEW required busing associated with the desegregation techniques of school "pairing" and "clustering."[2d/] Generally, pairing or clustering plans involve the division or reorganization of grade structures between or among two or more schools, with student attendance predicated on grade level rather than geographical proximity.

[2b] 518 F. 2d 853 (6th Cir. 1975), *cert. denied* 423 U.S. 1000 (1976). See, also, *Morgan* v. *Kerrigan*, 530 F. 2d 401 (1st Cir.), *cert. denied* 426 U.S. 935 (1976); *Hart* v. *Community School Board*, 512 F. 2d 37 (2d Cir. 1975); *Evans* v. *Buchanan*, 415 F. Supp. 328 (D. Del. 1976), *aff'd* 555 F. 2d 373 (3d Cir. 1977).

[2c] Section 208 of Pub. L. 94-439 (9/30/76). The Byrd Amendment provided in full as follows:

> None of the funds contained in this Act shall be used to require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home, and which offers the courses of study pursued by such student, in order to comply with Title VI of the civil Rights Act of 1964.

The Justice Department relied in part on the above qualification in the Byrd amendment to reach this conclusion. It reasoned from the Byrd language that Congress intended the transportation limits to apply only after pairing or clustering of schools, not to the original student assignment scheme. That is, a student could be assigned or required to attend a school beyond the prescribed limits if, because of a grade structure reorganization adopted for desegregation purposes, the school nearest the home did not provide "the course of study pursued by such student." The similarity of the Byrd language to that proposed in the busing provisions of the bill suggest that the latter's time and distance limitations could likewise be interpreted in a manner contrary to the probable intent of its sponsers.[2e/]

[2d/] See, 123 Cong. Rec. 10908 (daily ed. 6/28/77).

[2e/] This result could probably be avoided, however, by the addition of language to eliminate any inherent ambiguity and narrowing the scope of the present qualifying language. An example may be found in the Eagleton-Biden Amendment adopted in 1977 as a response to the Justice Department interpretation of its predecessor, the Byrd Amendment. Eagleton-Biden, first enacted by the fiscal 1978 Labor-HEW appropriations, §208, Pub. L. 95-205, 91 Stat. 1460 (12/9/77) incorporated the Byrd language but added the following:

> For the purpose of this section an indirect requirement of transportation of students includes transportation of students to carry out a plan involving the reorganization of the grade structure of schools, the pairing of schools, or the clustering of schools, or any combination of grade restructuring, pairing, or clustering. The prohibition in this section does not include the establishment of magnet schools.

Barring these or other narrow judicial interpretations of the bill's language, it may be appropriate, in order to more fully appraise its legal and constitutional implications, to review the course of Supreme Court decisions stemming from Brown v. Board of Education.[3] In Brown the Court held that the Equal Protection Clause forbade State policies mandating the separation of students in the public schools on the basis of race. In striking down State statutes which required or permitted, by local option, separate schools for black and white children, the Court declared that the "separate but equal" doctrine announced in Plessy v. Ferguson[4] had no place in public education.

But over the next two decades, the nature of the obligation placed on school officials evolved from the mere cessation of overt racial assignment, the target of Brown, to elimination of the "effects" of the former dual system. In Green v. County Board of Education[5] the Court held that school officials had an "affirmative duty" to abolish the "last vestiges" of a dual school system, including all "racially identifiable" schools. In addition to the racial composition of their student bodies or staffs, schools could be racially identifiable by comparison with other schools in the district if the quality of their physical facilities, curricula, or personnel differ significantly. Although there

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3/ 347 U.S. 483 (1954).

4/ 163 U.S. 537 (1895).

5/ 391 U.S. 430, 438-9 (1968). In Green, the Court declared that "[s]chool boards. . .operating state compelled dual school systems [are] nevertheless charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination [is] eliminated root and branch." This affirmative duty requires the "school board today. . .to come forward with a plan that promises realistically to work, and promises reaslistically to work now." See, also, Alexander v. Holmes County Board, 396 U.S. 19 (1969).

is no duty to make schools identical in all respects, there is a "presumption" against schools that are one race or "substantially disproportionate" in racial composition, or that otherwise diverge markedly from the norm defined by these criteria. Thus, the Court in Swann v. Board of Education[6/] and later cases[7/] held that such differences between schools in a former statutory dual system establishes a *prima facie* case that school officials are continuing to discriminate or that they have failed in their duty to remedy fully the effects of past discrimination. Since the 1973 ruling in the Denver case, Keyes v. School District No. 1,[8/] it is also clear that the same affirmative constitutional duty attaches where *de jure* segregation in a "meaningful portion" of the system results from intentional school board policies in a district without a prior history of statutory dual schools.

The Court in Swann sought to define the scope of judicial authority to enforce school district compliance with this constitutional obligation and set out "with more particularity" the elements of an acceptable school desegregation plan. With respect to the assignment of pupils, the Court stated that in eliminating illegally segregated schools, the "neighborhood school" or any other student assignment plan "is not acceptable because it appears to be neutral." Rather, in a system that is *de jure* segregated, a constitutionally adequate plan may require "a frank--and sometimes drastic--gerrymandering of school districts and attendance zones," resulting in zones "neither compact nor continguous, indeed they may be at opposite ends of the city." Accordingly, the Federal

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[6/] 402 U.S. 1 (1971).

[7/] Columbus Board of Education v. Penick, 443 U.S. 449 (1979); Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979).

[8/] 413 U.S. 189 (1973).

courts may require school officials to implement plans involving "gerrymandering of school districts. . .[and] 'pairing,' 'clustering,' or 'grouping' of schools with attendance assignments made deliberately to accomplish the transfer of Negro students out of formerly Negro schools and transfer of White students to formerly all-Negro schools.[9/]"

A related aspect of the Swann decision was its qualified endorsement of student transportation as a desegregation remedy. The Court cautioned that "the permissible scope of student transportation" could not, because of the "very nature" of the desegregation process, be precisely defined "for the infinite variety of problems presented in thousands of situations." Nonetheless, finding that "[d]esegregation plans cannot be limited to the walk-in school," the Court held that, "as a normal and accepted tool of educational policy," busing for desegregation purposes could, subject to certain limitations, be employed "where the assignment of children to the school nearest their home would not produce an effective dismantling of the dual system." While suggesting limits, however, the Court declined to provide any "rigid guidelines" for future cases, saying only that busing could be used where "feasible," and that its use was to be limited by considerations of times and distances which would "either risk the health of the children or significantly impinge on the educational process.[10/]" In addition, limits on time of travel would vary with many factors, "but probably with none more than the age of the students.[11/]"

Three companion cases decided by the Court on the same day as Swann also addressed the judicial use of remedial student assignments and busing in school

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[9/] 402 U.S. at 27.

[10/] 402 U.S. at 30-31.

[11/] 402 U.S. at 31.

desegregation cases. In Davis v. Board of School Commissioners[12] the Court reversed the Fifth Circuit Court of Appeals for failing to achieve adequate desegregation of Mobile County, Alabama. The Fifth Circuit had affirmed a desegregation order that did not require busing of students across a major highway which divided Mobile into district zones. The Supreme Court's reversal was critical of the appeals court decision because "inadequate consideration was given to the possible use of bus transportation and split zoning."

> As we have held, 'neighborhood school zoning,' whether based strictly on home-to-school distance or on 'unified geographic zones' is not the only constitutionally permissible remedy; nor is it per se adequate to meet the remedial responsibilities of local boards. Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. A district court may and should consider the use of all available techniques including restructuring of attendance zones and both contiguous and noncontinguous attendance zones. [citing Swann]. The measure of any desegregation plan is its effectiveness. [13]

In McDaniel v. Barresi[14] the Court reversed a ruling of the Georgia State Supreme Court that a school desegregation plan imposed by the former Department of H.E.W. under Title VI of the 1964 Civil Rights Act violated the rights of white students and their parents because it treated students differently on account of race. The Court held that in compliance with its duty under Green and Swann to convert to a unitary system, the local board of education of Clark County, Georgia had properly considered the race of the students in fixing school attendance boundaries.

> In this remedial process, steps will almost invariably require that students be assigned 'differently because

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[12] 402 U.S. 33 (1971).

[13] 402 U.S. at 37.

[14] 402 U.S. 39 (1971).

> of their race.' [citation omitted] Any other approach would freeze the status quo that is the target of all desegregation processes. [15]

Finally, in North Carolina Board of Education v. Swann,[16] the Court held unconstitutional North Carolina's anti-busing law, which forbade the assignment or transportation of any student on the basis of race or for the purpose of achieving racial balance in the public schools. The State statute was found to prevent implementation of desegregation plans required by the Fourteenth Amendment and was therefore unconstitutional. According to Chief Justice Burger, "[b]us transportation has long been an integral part of all public school systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it."[17]

In his ruling on application for a stay order in Winston-Salem/Forsyth County Board of Education v. Scott,[18] Chief Justice Burger, sitting as Circuit Justice, offered some additional indication of the limits imposed by Swann on student busing. The Chief Justice found "disturbing" the district court's apparent agreement with the school board that Swann required that each school have a proportion of blacks and whites corresponding to the proportion prevailing in the system as a whole. He denied the stay application, but only after chastising the board for being vague in its reference to "one hour average travel time," and indicated, "by way of illustration," that three hours would be "patently offensive" when school facilities are available at a lesser distance. The Chief Justice also stressed that he would be disposed to grant the application for stay if it had been made earlier and seemed especially concerned that the court's order called for 16,000 more students to be transported in 157 more buses, nearly double the number before adoption of the plan.

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[15] 402 U.S. at 41.

[16] 402 U.S. 42 (1971).

[17] 402 U.S. at 46.

[18] 404 U.S. 1221 (1971).

Short of the presumptive upper limit of three hours suggested by the Chief Justice in Winston-Salem/Forsyth case, and the broad health and safety limitations noted in Swann, there appear to be no hard and fast rules as to the time or distance of travel that will be permitted. As in other equity cases, the lower Federal courts were vested by Swann with "broad discretion" to determine, in the first instance, what specific measures may or may not be necessary to achieve "the greatest possible degree of actual desegregation" in a given case. Thus, for example, in Mannings v. Board of Public Instruction,[19/] the Fifth Circuit approved a plan to desegregate the Tampa, Florida schools which required the transportation of some 20,000 additional students for bus rides averaging 45 minutes to 1 1/2 hours one way. On the other had, the Sixth Circuit in the Memphis case,[20/] where total desegregation could have been accomplished by a plan involving bus rides up to 60 minutes, affirmed a plan which left some 25,000 black students in 25 all-black schools, but which reduced the average bus ride to 38 minutes each way, with no rides over 45 minutes in length. The courts in several other cases have attempted to gauge the extent of required busing to that involved in the Swann case. Under the plan approved by the Supreme Court in Swann, trips for elementary school students averaged about seven miles and the trial court had found that they would take "not over 35 minutes at most." The Supreme Court noted that this compared favorably with the transportation plan previously operated in Charlotte under

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19/ 427 F. 2d 874 (5th Cir. 1971).

20/ Northcross v. Board of Education, 341 F. Supp. 583 (W.D. Tenn. 1972), aff'd 489 F. 2d 15 (6th Cir. 1973), cert. denied. 416 U.S. 962 (1974).

which each day 23,600 students on all grade levels were transported an average of 15 miles one way for an average trip requiring over an hour.[21]

As this sampling of cases suggests, it is impossible to determine in advance the impact of the bill's restrictions, in any particular case, on the courts' discretion to order relief necessary for compliance with the remedial principles of *Swann* and related cases. This is particularly so because, in addition to the time and distance limitations in §3, the bill employs other non-quantitative, and perhaps unquantifiable, restrictions on judicial authority to order student transportation. For example, irrespective of considerations of travel time or distance, the bill would preclude transportation orders that are "likely" to aggravate "racial imbalance" in the system, because of white flight or otherwise, or to have "a net harmful effect on the quality of education" in the system, or where "reasonable alternatives" exist. In some cases, the *Swann* standards might be met without requiring busing beyond the limits imposed by the bill, but in the circumstances of the *Swann* case itself, and a substantial number of cases where it has been employed, some more extensive busing might be required to desegregate schools to the extent mandated by current constitutional standards. In these cases, the courts would be effectively restrained from fully exercising the equitable discretion they possess under existing precedent. To the extent that S. 528 may vary from or alter the remedial powers of the courts in school desegregation cases, its constitutional validity may depend on the reach of Congress' authority under §5 of the Fourteenth Amendment, which is cited as authority in §2(b) of the bill,[22] to define the scope of equal protection guarantees. Another potential source of legislative authority for the proposed restrictions may derive from Article III of the Constitution which grants Congress the power to restrict the original jurisdiction of the lower Federal courts and the appellate jurisdiction of the Supreme Court in certain cases. The remainder of this report analyzes both these sources in relation to Congress' power to enact the busing limitations in S. 528.

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[21] See, e.g., *Vaughn* v. *Board of Education of Prince George's County*, 355 F. Supp. 1051 (D. Md. 1972), *aff'd* 468 F. 2d 894 (4th Cir. 1973) (maximum busing time of 35 minutes per pupil, with mean average of 14 minutes per one-way bus trip compared with 35 minute maximum in *Swann* though that represented a reduction in maximum one-way bus trips prior to desegregation in that case); *Brewer* v. *School Board of City of Norfolk, Va.*, 456 F. 2d 943 (4th Cir.), *cert. denied* 406 U.S. 905 (1972) ("30 minutes each way" not "substantially different" from that required by *Swann*); *Moss* v. *Stamford Board of Education*, 365 F. Supp. 675 (D. Conn. 1973) (plan provided "maximum time to be spent on the buses by any child is 34 minutes--slightly less than the maximum time in the *Swann* case and therefore acceptable"); *Morgan* v. *Kerrigan*, 401 F. Supp. 216 (D. Mass. 1975), *aff'd* 530 F. 2d 401 (1st Cir. 1976) (under final plan approved for the Boston schools "the average distance from home to school will not exceed 2.5 miles, and the longest possible trip will be shorter than 5 miles" with travel time averaging "between 10 and 15 minutes each way, and the longest trip will be less than 25 minutes").

II.

Section 5 of the Fourteenth Amendment vests with Congress the "power to enforce, by appropriate legislation, the provisions of this article." The first significant recognition of Congress' role in the definition of constitutional rights and implementing remedies under §5 is found in Katzenbach v. Morgan[23] which interpreted the section as a "positive grant" to Congress of "the same broad powers expressed in the Necessary and Proper Clause." The Supreme Court there held that §4(e) of the Voting Rights Act of 1965, which invalidated a New York literacy requirement for voting as applied to Puerto Rican residents educated in American Flag schools, was appropriate legislation under §5. This was so despite the Court's own refusal, in Lassiter v. Northampton Election Board,[24/] to strike down State literacy requirements for voting as a violation of the Equal Protection Clause in the absence of any discriminatory use of the test. To be appropriate legislation, §4(e) had to be "plainly adopted to the end" of enforcing equal protection and "not prohibited by, but. . .consistent with the letter and spirit of the Constitution."

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[22] Section 2(b) of the bill states: "The Congress is hereby exercising its power to enforce, by appropriate legislation, the provisions of the fourteenth amendment."

[23] 384 U.S. 641 (1966).

The decision in Morgan rested on two separate rationales, both involving a major extension of congressional enforcement authority under §5. First, Justice Brennan, writing for himself and five other members of the Court, with the separate concurrence of Justice Douglas, characterized §5 as a broad grant of discretionary power to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[25/] In this view, Congress is empowered by §5 to enact prophylactic measures to ensure enjoyment of equal protection guarantees against the potentiality of official discrimination and to remove obstacles to the States' performance of their obligations under the amendment. As in reviewing necessary and proper clause legislation, where the Court is able "to perceive a basis" for the congressional determination, its inquiry is at an end. Here, the Court held,

> It is for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations--the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interest that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. [26/]

[24/] 360 U.S. 45 (1959).

[25/] 384 U.S. at 650-51.

[26/] 384 U.S. at 653.

Thus, despite the absence in the record of any actual discrimination by New York in the provision of such services, it was within Congress' power to act to insure that Puerto Ricans have the political power to enable them "better to obtain 'perfect equality of civil rights and the equal protection of the laws.'"[27/] The second branch of Morgan held that §5 confers independent authority on Congress to find that a State practice violates the Equal Protection Clause even if the Court is unwilling to make the same determination.

> Here, again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement. . .constitute[s] an invidious discrimination in violation of the Equal Protection Clause. 28/

Accordingly, the majority in Morgan suggested not only that Congress has authority under §5 to define as well as remedy denials of equal protection but also that the courts should defer to congressional exercise of that authority.

Justices Harlan and Stewart, who joined in the only dissenting opinion, rejected both branches of the majority's rationale. They dismissed the remedial theory as inapplicable to the challenged legislation. Since §4(e) had been introduced from the floor during debate on the Voting Rights Act, there had been no investigation of legislative facts to support a finding of discrimination against Puerto Ricans in rendering of governmental services. As to the second rationale, their objection was more fundamental. The issue whether New York's denial of voting rights to those subsequently enfranchised by §4(e) violated equal protection was a judicial question which could not be resolved by Congress. A congressional determination that Spanish-speaking citizens are as capable of making informed decisions in elections as English-speaking citizens might have some bearing on that judicial decision, but in the dissenters' view,

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27/ 384 U.S. at 653.

28/ 384 U.S. at 656.

courts should, in interpreting the Equal Protection Clause, give no more deference to congressional judgments than those of State legislatures.[29/]

The broad language of the Morgan majority might support congressional prescription of the remedial standards in S. 528 even if they impose limits, in terms of time or distances of travel or otherwise, on judicially ordered student transportation to effectuate public school desegregation. But this conclusion is rendered less certain by indications in Morgan that Congress may only exercise its §5 authority to facilitate the realization or extend the protections of the Fourteenth Amendment. Morgan upheld a voting eligibility standard arguably more liberal than the judicially defined constitutional requirement. A caveat to the Court's opinion in Morgan emphasized the distinction between the power to expand and the power to restrict the reach of equal protection thusly:

> Section 5 does not grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' We emphasize that Congress' power under section 5 is limited to adopting measures to enforce the guarantees of the Amendment; section 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing States to establish racially segregated systems of education would not be--as required by section 5--a measure 'to enforce'

[29/] According to the dissenters:

> . . .[W]e have here not a matter of giving deference to a congressional estimate based on its determination of legislative facts, bearing upon the validity vel non of a statute, but rather what can at most be called a legislative announcement that Congress believes a state law to entail an unconstitutional deprivation of equal protection. Although this kind of declaration is of course entitled to the most respectful consideration, coming as it does from a concurrent branch and one that is knowledgeable in matters of popular political participation, I do not believe that it lessens our responsibility to decide the fundamental issue of whether in fact the state enactment violates federal constitutional rights. 384 U.S. at 669-70 (dissenting opinion).

> the Equal Protection Clause since that clause of its own force prohibits such state laws. 30/

Accordingly, insofar as S. 528 would place limits on transportation remedies that could interfere with effectuation of the right to a desegregated public education as defined in the case law, it may come within this explicit exception to the Morgan doctrine. 31/ In addition, Morgan concerned a congressional statute directed to certain actions by the States. The remedial standards in S. 528, on the other hand, directly implicate the equitable power of the Federal courts and may, therefore, involve different considerations. 32/ Finally,

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30/ 384 U.S. at 651-52, n. 10.

31/ However, Professor Charles Alan Wright, a noted constitutional scholar at the University of Texas, concluded in congressional testimony on earlier busing legislation that:

> Neither Swann nor any other Supreme Court case holds that there is a constitutional right to attend a racially balanced school or a constitutional right to be taken to school by bus for that purpose. Swann explicitly rejected the notion that the Constitution requires racial balance, 402 U.S. at 24, and recognized that one race schools may remain so long as they are not part of state-enforced segregation, 402 U.S. at 25-26. It would seem that the power of Congress to speak to the question of remedy and to say whether and under what circumstances a particular remedy is to be used, is no less for violation of the Equal Protection Clause than it is for violation of the fourth amendment, the Self Incrimination Clause, the Due Process Clause, or any other provision of the Constitution.

A Bill to Further the Achievement of Equal Educational Opportunities: Hearings on H.R. 13915 Before the House Committee on Education and Labor, 92d Cong., 2d Sess. 1163 (1972) (statement of Charles Alan Wright).

32/ In this regard, one commentator has noted:

> Whatever the reach of section 5 as a vehicle for augmenting the power of Congress to regulate matters otherwise left to the States, it provides no authority for Congress to interfere with the execution or enforcement of federal court judgments or to overturn federal judicial determinations of the requirements of the fourteenth amendment. The entire fourteenth amendment increased congressional power at the expense of the states, not of the federal courts.

Rotunda, R.D., Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing, 64 Geo. L. J. 839, 859 (1976).

the full breadth of congressional power elaborated in Morgan may not command a majority of the present court.

Four years after Morgan, the Court in Oregon v. Mitchell[33/] reconsidered the breadth of congressional power under §5 within the context of the 1970 amendments to the Voting Rights Act which, inter alia, mandated a minimum voting age of 18 for all elections, State and Federal, contrary State law notwithstanding. A literal reading of Morgan suggests that the congressional determination would be upheld provided that there was a perceptible basis for concluding that the extension of the franchise to 18 years old was necessary to effectuate Fourteenth Amendment guarantees or, alternatively, that such age discrimination was an invidious classification unsupported by a "compelling state interest." However, only three Justices, Brennan, White, and Marshall, fully embraced the broad rationale of Morgan while Justice Douglas, in a partial concurrence, found simply that "Congress might well conclude that a reduction of the voting age from 21 to 18 was needed in the interest of equal protection." Justices Stewart, Burger, Blackmun, and Harlan found that Congress lacked the power under §5 to change age qualifications for State elections. The deciding vote was cast by Justice Black who found that Congress' §5 power was limited by the Constitution's delegation to the States of the power to determine qualifications for State elections.

The Court thus rejected 5 to 4 the application of the 18 year age requirement to State elections, but the conflicting rationales of the Justices served only to obscure the issue of the scope of congressional power under §5. Justice Brennan, joined by Justices White and Marshall, reasoned on the

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[33/] 400 U.S. 112 (1970).

basis of the second branch of Morgan that, whatever the Court's view of excluding 18 year olds from the vote, Congress' determination was entitled to deference because "proper regard for the special function of Congress in making determinations of legislative fact compels the Court to respect those determinations unless they are contradicted by evidence far stronger than anything that has been adduced in these cases."[34/] Elaborating further on the justification for judicial deference to congressional fact-finding, Justice Brennan stated:

> The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication. Courts, therefore, will overturn a legislative determination of a factual question only if the legislature's finding is so clearly wrong that it may be characterized as 'arbitrary,' 'irrational,' or 'unreasonable.' [35/]

A significant aspect of Justice Brennan's opinion in Oregon was its apparent reformulation of the limiting principle in Morgan predicated on the dilution of equal protection rights. Instead of the Morgan distinction between legislative dilution versus expansion, Justice Brennan emphasized as critical under §5 Congress' superior capacity to "determine whether the factual basis necessary to support a state legislative discrimination actually exists."

> A decision of this Court striking down a state statute expresses, among other things, our conclusion that the legislative findings upon which the statute is based are so far wrong as to be unreasonable. Unless Congress were to unearth new evidence in its investigation, its identical findings on the identical issue would be no more reasonable than those of the state legislature. [36/]

Although not entirely clear, this statement may imply, contrary to Morgan,

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[34/] 400 U.S. at 240.

[35/] 400 U.S. at 247-48.

[36/] 400 U.S. at 249, n. 31.

an indefinite power in Congress, as legislative fact-finder, to narrow the scope of equal protection and due process rights on the basis of new evidence.

Five members of the Court took issue with Justice Brennan's position, finding various limitations on Congress' §5 power. Justice Black argued that Congress has power under §5 to override an express delegation to the States only in cases of racial discrimination.[37] Justice Harlan, after determining that the Fourteenth Amendment was not intended to reach discriminatory voter qualifications of any kind, rejected the notion that Congress has a "final say on matters of constitutional interpretation. . . as fundamentally out of keeping with the constitutional structure." Justice Stewart, joined by the Chief Justice and Justice Blackmun, read Morgan to give Congress power to do no more than "provide the means of eradicating situations that amount to a violation of the Equal Protection Clause."[38] They argued that §4(e) had been upheld on the alternative ground of remedying discrimination against Puerto Ricans in the furnishing of public services. Discrimination against Puerto Ricans was an undoubted invidious discrimination. Thus, Morgan's two branches merely allowed Congress to act upon established unconstitutionality, to impose upon the States remedies "that elaborated upon the direct command of the Constitution," and to overturn State laws if "they were in fact used as instruments of invidious discrimination even though a court in an individual lawsuit might not have reached that factual conclusion."[39] But, in their view, nothing in Morgan sustained congressional power to "determine as a matter of substantive constitutional law what situations fall within the ambit of the [equal protection] clause, and what state interests are 'compelling.'"[40]

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[37] 400 U.S. at 129.

[38] 400 U.S. at 296.

[39] 400 U.S. at 296.

The opinions of a majority of Justices in Oregon appear to have severely undermined Morgan's second rationale that §5 authorizes Congress to define the substantive reach of the Equal Protection Clause by invalidating State legislation. The first branch of Morgan, however, recognizing congressional power to act to remedy State denials of equal protection appears to have survived, at least with respect to State practices aimed at "discrete and insular" minorities.[41] As in Oregon, the Court in Fullilove v. Klutznick[42] relied on Congress' competence as legislative fact-finder to uphold a statutory remedy enacted pursuant to §5. It there approved the minority business enterprise (MBE) set aside provision in the Public Works Employment Act of 1977[43] on the basis that the program was aimed at remedying a discriminatory situation found to exist by Congress.

> With respect to the MBE provision, Congress has abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination ... Accordingly, Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection laws. [44]

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[40] 400 U.S. at 295-6.

[41] See, 400 U.S. at 129 (Black, J.). It appears that, even in Justice Stewart's view, although Congress can act only upon the "direct command of the Constitution," it can circumvent that limitation by hypothesizing the existence of racial discrimination and declaring that its enactment is necessary to correct that discrimination. See, 400 U.S. at 295, n. 14 (Stewart, J., concurring in part and dissenting in part).

[42] 100 S. Ct. 2758 (1980).

[43] 42 U.S.C. 6701 (1979 Supp.).

[44] 100 S. Ct. at 2774-75.

The distinction between rights and remedies for constitutional violations, as it relates to the power of Congress, has found expression in other contexts as well. In City of Rome v. United States,[45] the Court upheld Congress' power to enact such remedial legislation pursuant to its comparable enforcement authority under section 2 of the Fifteenth Amendment. At issue in this case was the constitutionality of the Voting Rights Act of 1965, as amended, and its applicability to electoral changes and annexations made by the city of Rome, Georgia. Such changes were deemed to have the effect of denying the right to vote on account of race or color, and thus were in violation of the Act. The Court specifically held that, "even if §1 of the Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to §2, outlaw voting practices that are discriminatory in effect."[46] The Court in City of Rome relied to a great extent on its holding in South Carolina v. Katzenbach[47] which dealt with remedies for voting discrimination. It also cited Katzenbach v. Morgan. The Court wrote:

> ... In the present case, we hold that the Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that §1 of the Amendment prohibits only intentional discrimination in voting. Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact. 48/

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[45] 446 U.S. 156 (1980).

[46] 446 U.S. at 173.

[47] 383 U.S. 301 (1966).

[48] 446 U.S. at 177.

Similarly, in Bivens v. Six Unknown Fed. Narcotics Agents,[49] the Court alluded to the power of Congress over remedies in the context of an action for damages against Federal officials for violation of Fourth Amendment rights. In holding a damage remedy implied by the constitutional prohibition against unreasonable searches and seizure, the Court sustained the action, but acknowledged its deference to Congress, noting that "we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." Chief Justice Burger, joined in dissent by Justices Black and Blackmun, urged Congress, without adverting to Morgan or Oregon, to create different rules to supplant judicially created standards to implement Fourth Amendment rights.[50] A noted legal commentator has conceived the matter as follows:

> The denial of any remedy is one thing. . . .But the denial of one remedy while another is left open, or the substitution of one remedy for another, is very different. It must be plain that Congress necessarily has a wide choice in the selection of remedies, and that a complaint about action of this kind can rarely be of constitutional dimension. [51]

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[49] 403 U.S. 388, 397, (1971).

[50] Chief Justice Burger was particularly critical of the judicially created exlusionary rule, requiring the suppression of illegally seized evidence in Federal criminal trials, and stated:

> Reasonable and effective substitutes can be formulated if Congress would take the lead, as it did for example in 1946 in the Federal Tort Claims Act. I see no insuperable obstacle to the elimination of the suppression doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials. 403 U.S. at 421.

[51] Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1366 (1953).

It is therefore possible that Congress' power under §5 to legislate remedies for judicially recognized violations of the Equal Protection Clause, as affirmed in Morgan and arguably preserved by Oregon and later cases, could be advanced in support of the restrictions on busing in S. 528. Of significance in evaluating these limits may be the language in the Swann decision which permits the district courts to deny busing when "the time or distance of travel is so great as to risk either the health of the children or significantly impinge the educational process."[52] The Swann Court also acknowledged that the fashioning of remedies is a "balancing process" requiring the collection and appraisal of facts and the "weighing of competing interests," a seemingly appropriate occasion under Morgan for congressional intervention. In addition, busing is only one remedy among several that have been recognized by both the courts and Congress to eliminate segregated public schools.[53] Thus, the findings in §2 of the bill relative to the harms of busing, particularly if supported by other evidence adduced in congressional hearings or debate, may comport with the emphasis of Justice Brennan's opinion in Oregon on

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[52] 402 U.S. at 30-31.

[53] In enacting Title II of the Education Amendments of 1974, captioned "Equal Educational Opportunities and Transportation of Students," Congress specified practices which are to be considered denials of due process and equal protection of the laws and delineated a "priority of remedies," ranging from more preferred to less preferred and even prohibited. Thus, the courts are directed to consider and make specific findings with regard to the efficacy of the following before requiring implementation of a busing plan:

> (a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;
>
> (b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

"(Continued)"

Congress' superior fact-finding competence, and therefore be entitled to judicial deference.[54] By contrast, the dissenters in Morgan found §4(e) of the Voting Rights Act failed to qualify as a remedial measure only because of the lack of a factual record or legislative findings.

Complicating this conclusion, however, are judicial statements implying that the elimination of busing as a remedy to the extent contemplated by the

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"(Continued)"

> (c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin;
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> (d) the creation or revision of attendance zones or grade structures without requiring transportation beyond that described in section 1714 of this title;
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> (e) the construction of new schools or the closing of inferior schools;
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> (f) the construction or establishment of magnet schools; or
>
> (g) the development and implementation of any other plan which is educationally sound and administratively feasible, subject to the provisions of sections 1714 and 1715 of this title.
> 42 U.S.C. 1713.

[54] Richard Kleindienst, Acting Attorney General, while testifying before the House Committee on the Judiciary, stated:

> The question here is the appropriate remedy for implementation of the right to a desegregated education, an area in which Congress' special fact finding expertise should be utilized. Legitimate questions that might be raised in the area are, for example: How much busing will harm the health of a child? How much may impair the educational process? How great are the benefits to children in receiving a desegregated education compared to the detriments of busing? These are essentially legislative--not judicial--questions.

Proposed Amendment to the Constitution and Legislation Relating to Transportation and Assignment of Public School Children: Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, 92d Cong., 2d Sess. 1145 (1972) (statement of Hon. Richard G. Kleindienst, Acting Attorney General of the United States).

bill may be fraught with constitutional difficulty. For example, in North Carolina Board of Education v. Swann,[55] the Supreme Court invalidated an analogous State law restriction on busing for desegregation purposes noting that "it is unlikely that a truly effective remedy could be devised without continued reliance upon it." This, and the consistent judicial emphasis on affirmative desegregation remedies since Green, suggests that the correlative right to attend and the obligation to establish racially desegregated schools are inseparable. Accordingly, the distinction in Morgan and Oregon between constitutional rights and remedies may become blurred in the school desegregation context in those cases where student transportation, beyond the limits prescribed by the bill, is deemed necessary for compliance with current constitutional standards. Of course, the fact that the State courts are left free by the bill to order any form of remedy to implement a desegregation plan may be argued in reply to objections that busing may be the only effective remedy available in some circumstances. Nonetheless, because the bill could be viewed as restricting or abrogating a remedy essential to the right to a desegregated education in such cases, and involves the issue of Congress' power vis a vis the Federal courts rather than the States as in Morgan and Oregon, substantial questions relative to the application of those precedents to congressional authority to enact S. 528 remain. In the final analysis, the validity of the bill as an exercise of congressional power under §5 may depend upon whether the busing restrictions are viewed as based on a rationally supportable factual determination of the effectiveness of such remedies within the constitutional framework of Swann and related cases, or are instead a declaration of a constitutional standard in conflict with prevailing judicial standards.

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[55] 402 U.S. 43, 46 (1971).

III.

An alternative source of congressional authority for the remedial limitations imposed by S. 528 may reside in Article III of the Constitution which defines and delimits the judicial power of the United States. Article III does not by its terms create any of the inferior Federal courts, but instead confers that power on Congress:

> Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . [56]

Congressional power over the appellate jurisdiction of the Supreme Court is found in Article III, Section 1 which defines the original and appellate jurisdiction of the Supreme Court as follows:

> In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such exceptions, and under such Regulations as the Congress shall make.

It has sometimes been argued that the language of Article III compels Congress to vest the entire judicial power in some inferior Federal court.[57]

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[56] This Congressional power is also affirmed in Article I of the Constitution concerning the legislative power, which states:

> Section 8. The Congress shall have the Power. . .
> To constitute Tribunals inferior to the Supreme Court.

[57] Justice Story, in Martin v. Hunter's Lessee, 14 U.S. (1 Wheaton) 304, 330-331 (1816), argued:

> Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself; and if in any of the cases enumerated in the constitution, the state courts did not then possess jurisdiction the appellate jurisdiction of the Supreme Court ... could not reach those cases, and, consequently, the injunction of the constitution, that the judicial power "shall be vested" would be disobeyed. It would seem, therefore, to follow, that congress are

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But the Supreme Court has consistently construed Congress' power over the jurisdiction of the lower Federal courts to be virtually plenary. In Cary v. Curtis,[58] for instance, the Court stated:

> ... the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good .... [T]he organization of the judicial power, in definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the legislature.

Again in Kline v. Burke Construction Co.,[59] the Court stated:

> The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part ....

More particularly, Congress has engaged in a variety of actions with respect to the jurisdiction of the lower Federal courts, and those actions have consistently been upheld by the Supreme Court. Not until 1875, for instance, did Congress

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> bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is exclusively vested in the United States, and of which the supreme court cannot take original cognizance ... [T]he whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority.

See, also, Eisentrager v. Forrestal, 174 F. 2d 961 (D. C. Cir. 1949), reversed on other grounds sub nom. Johnson v. Eisentrager, 339 U.S. 763 (1950).

[58] 44 U.S. (3 Howard) 236, 245, (1845).

[59] 260 U.S. 226, 234 (1922).

vest the inferior Federal courts with general Federal question jurisdiction.[60] Moreover, the Supreme Court has consistently affirmed such Congressional actions over the jurisdiction of the lower Federal courts as (1) withdrawing jurisdiction even as to pending cases,[61] (2) delimiting lower Federal court jurisdiction over a particular cause of action to a single tribunal,[62] and (3) selectively withdrawing the jurisdiction of the lower Federal courts to adjudicate particular issues or to order particular remedies.[63]

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[60] 18 Stat. 470, Sec. 1 (Mar. 3, 1875). In 1801 Congress had briefly granted the inferior federal courts jurisdiction over "all cases in law and equity, arising under the Constitution and laws of the United States (2 Stat. 89, Sec. 11 (Feb. 13, 1801)), but a year later repealed that grant (2 Stat. 132 (Mar. 3, 1802)).

[61] Bruner v. United States, 343 U.S. 112 (1952) (amendment of statute concerning claims for service to U.S.--the Tucker Act--withdrawing federal district court jurisdiction over claims by employees as well as officers, without any reservation as to pending cases, requires dismissal of pending cases). See also De La Rama Steamship Co., Inc. v. United States, 344 U.S. 386 (1953) (general authority of Congress to withdraw federal court jurisdiction even as to pending cases affirmed, but General Savings Clause held to preserve pending claims in instant case).

[62] E.g., the Emergency Price Control Act of 1942 (56 Stat. 23) required all challenges to the validity of regulations adopted to enforce it to be brought in a single Emergency Court and barred all other Federal, state, or territorial courts from asserting jurisdiction over such challenges. The decisions of the Emergency Court were reviewable in the Supreme Court. This unusual jurisdictional scheme was held to be within Congress' constitutional power in Lockerty v. Phillips, 319 U.S. 182 (1943) and Yakus v. United States, 321 U.S. 414 (1944). Similarly, the Voting Rights Act of 1965 (79 Stat. 437, 42 U.S.C. 1973) limited jurisdiction over proceedings to terminate the coverage of the Act in a particular area to a single court in the District of Columbia, and this was upheld in South Carolina v. Katzenbach, 383 U.S. 301 (1966). See, also, the jurisdiction of the Temporary Emergency Court of Appeals as created by the Economic Stablization Act of 1970 (P.L. 91-379, 12 USC 1001) and as further defined in the Emergency Petroluem Allocation Act of 1973 (P.L. 93-159, 87 Stat. 628, 15 USC 751 et seq.) and the Energy Policy and Conservation Act of 1975. (P.L. 94-163, 89 Stat. 871).

[63] Modern examples include the Norris-La Guardia Act (47 Stat. 70, 29 USCA 101 et seq.), in which Congress restricted the jurisdiction of the Federal courts to issue restraining orders or temporary or permanent injunctions in labor disputes, upheld in Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938), and the Anti-Injunction Act (26 USCA 7421(a)), in which Congress barred all courts from entertaining suits to restrain the assessment or collection of any

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The Norris-LaGuardia Act[64], perhaps the most celebrated modern example of Congress' exercise of its Article III powers, removed the jurisdiction of the lower Federal courts to issue a restraining order or an injunction in labor disputes. In upholding the Act's limitation, the Supreme Court in Lauf v. E.G. Shinner & Co.[65], acknowledging that there is no constitutional right to a labor injunction, stated that "[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States." Signficantly, however, the Court had in an earlier case ruled that State legislation which imposed similar restrictions on employers' remedies constituted a denial of due process.[66]

Even more restrictive than the Norris-LaGuardia Act was the Emergency Price Control Act of 1942[67], which operated to limit both State and lower Federal court jurisdiction. Exclusive jurisdiction to determine the validity of any regulation, order, or price schedule was vested in a new Emergency Court of Appeals and even that court was denied power to issue any temporary restraining order or interlocutory decree. The Supreme Court upheld the Act in Lockerty v. Phillips[68], recognizing that Congress could so limit the jurisdiction

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tax, most recently upheld in Bob Jones University v. Simon, 416 U.S. 725 (1974). Earlier examples include the Judiciary Act of 1789, in which Congress excepted from the lower Federal courts' diversity jurisdiction those cases in which diversity resulted from an assignment of a chose in action, upheld in Sheldon v. Sill, 49 U.S (8 Howard) 441 (1850) and an 1839 statute in which Congress disallowed suits in assumpsit in the Federal courts against the collectors of customs duties which allegedly were assessed unlawfully, upheld in Cary v. Curtis, supra.

[64] 29 U.S.C. 101-115.

[65] 303 U.S. 323, 330 (1938).

[66] Truax v. Corrigan, 257 U.S. 312 (1921).

[67] Emergency Price Control Act, ch. 26, 56 Stat. 23 (1942).

[68] 319 U.S. 182 (1943).

of the Federal courts under Article III. In Yakus v. United States,[69/] the Court was faced with a more serious constitutional challenge to the Act in the context of a criminal prosecution for its violation. The defendant, who had been convicted by an enforcement court, claimed that the denial of a stay order during his appeal to the Emergency Court deprived him of due process. In rejecting this assertion, the Supreme Court stressed that "[t]here is no constitutional requirement that that test be made in one tribunal rather than another," and that the "award of an interlocutory injunction by courts of equity has never been regarded as a matter of right." Further, the Court seemed to suggest that Congress, in protecting the public interest, could impose some burdens on individual rights:

> If the alternatives, as Congress could have concluded, were wartime inflation or the imposition on individuals of the burden of complying with a price regulation while its validity is being determined, Congress could constitutionally make the choice in favor of the protection of the public interest from the dangers of inflation. 70/

The Health Programs Extension Act of 1973[71/] is further support for Congress' power to eliminate lower Federal court jurisdiction with respect to remedies. Section 401(b) of the Act provides that the receipt of Federal funds by a hospital does not *per se* authorize "any court" to require such hospital to perform any sterilization procedure or abortion if such was contrary to the hospital's religious or moral convictions. In Taylor v. St. Vincent's Hospital,[72/] an action was brought against the hospital claiming that it had violated plaintiff's constitutional rights by refusing her request to undergo a sterilization procedure.

69/ 321 U.S. 414 (1944).

70/ 321 U.S. at 439.

71/ 42 U.S.C. 300a-7(a).

72/ 369 F. Supp. 948 (D. Mont. 1973), *aff'd*, 553 F. 2d 75 (9th Cir. 1975), *cert. denied*, 424 U.S. 948 (1976).

The district court held that it did not have jurisdiction to hear the action in view of the Act, basing its decision on the power of Congress to control both the jurisdiction and the remedies of the lower Federal courts.

> There can be no doubt that Section 401(b) which restricts the course and power of inferior federal courts is a valid exercise of Congressional power. Under Article III of the Constitution, Congress can establish such inferior courts as it chooses. Its power to create those courts includes the power to invest them with such jurisdiction as it seems appropriate for the public. [citation omitted]. Further, Congress is free to legislate with respect to remedies the inferior Federal courts may grant. [citations omitted]. [73]

Thus, the language of Article III, the history of past Congressional action, and judicial interpretation of Congress' power all appear to affirm that Congress has broad authority to impose limits on the jurisdiction of the lower Federal courts, and this may be particularly so where the limitation relates to the remedial rather than adjudicatory functions of the court.[74] Although some cases have suggested that Congress' power over the jurisdiction of the lower Federal courts is limited by the taking clause of the Constitution[75] or the due process requirement that persons not be denied all judicial

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[73] 369 F. Supp. at 951.

[74] See, e.g. Glidden v. Zdanok, 370 U.S. 530, 557 (1962) where the Supreme Court approved the power of Congress to limit the equitable remedies of the Court of Claims, stating that "[n]o question can be raised of Congress' freedom, consistently with Article III, to impose such a limitation upon the remedial powers of a federal court."

[75] In the Portal-to-Portal Act of 1947 (29 U.S.C. 251-262) Congress removed Federal court jurisdiction over suits claiming overtime compensation under the Fair Labor Standards Act for activities prior and subsequent to the principal employment activity of the day. The statute was a response to a Supreme Court decision which had held such activities as walking to and from employees's work stations, changing clothes, and cleaning up to be compensable under the FLSA. (Anderson v. Mt. Clemens Pottery Co. 328 U.S. 680). In the leading case of Battaglia v. General Motors Corporation, 169 F. 2d 254 (2d Cir.) cert. denied 335 U.S. 887 (1948), the U.S. Court of Appeals for the Second Circuit held the validity of that withdrawal of Federal court jurisdiction to depend on

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remedies to a claimed deprivation of a Federal right,[76] neither may be pertinent to S. 528. As in Lockerty and Yakus, the right of access to a forum where full relief may be obtained is not abrogated, it is merely reallocated. The State courts would remain open to litigants to press claims that student transportation beyond that permitted by the bill is necessary to adequately desegregate the school system. As long as a litigant is able to proceed in State court, a viable forum exists, and there is arguably no denial of due process. In this regard, the Supreme Court has stated that "Congress could, of course, have routed all Federal constitutional questions through the State court system, saving to this Court the final say when it came to review of the state court judgments."[77] In addition, the full range of remedies authorized by the Equal Educational Opportunities Act of 1974 would be available to the lower Federal courts in desegregation cases, including the use of student transportation to the extent authorized by the bill.

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the validity of Congress' redefinition of activities compensable under the FLSA:

> We think...that the exercise by Congress of its control over jurisidiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court it must not so exercise that power as to deprive any person of life, liberty, or property without just compensation. Thus, regardless of whether subdivision (d) of section 2 (withdrawing federal court jurisdiction) had an independent end in itself, if one of its effects would be to deprive appellants of property without due process or just compensation, it would be invalid. 169 F. 2d at 257.

Nonetheless, the court upheld the withdrawal of jurisdiction.

[76] See Cary v. Curtis, supra, (McLean, J., dissenting) and Yakus v. United States, supra.

[77] Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

The bill's restrictions as they affect the appellate jurisdiction of the Supreme Court may be more problematic, however. Article III confines Congressional power over the appellate jurisdiction of the Supreme Court to the making of "Exceptions and. . .Regulations. . .," a power seemingly less complete on its face than Congress' power to "ordain and establish" the inferior courts. Indeed, it has even been suggested that the historical evidence surrounding the exceptions clause of Article III indicates that it should be read in light of the contemporary State practice to confine regulation basically to housekeeping matters and to certain proceedings where neither error or certiorari traditions had been available.[78] Additional uncertainty stems from the fact that since the Judiciary Act of 1789 Congress has made no attempt to sharply curtail the appellate jurisdiction of the Supreme Court, and thus the possible limits of its power have not been fully tested. This is particularly true with respect to Supreme Court review of State court decisions concerning Federal rights:

> [T]he Supreme Court has always had authority, under certain circumstances, to review a final judgment or decree of the highest court of a state in which a decision could be had, where. . .the judgment turns upon a substantial federal question. 80/

Nonetheless, numerous statements by the Supreme Court can be found describing Congress' power over its appellate jurisdiction in as broad a terms as those used to describe Congress' power over the jurisdiction of the inferior Federal courts. For example, in The "Francis Wright," Chief Justice Waite

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78/ See, J. Goebel, The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, p. 240 (P. Freund ed. 1971). Also, Merry, "Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis," 47 Minn. L. Rev. 53 (1962).

79/ 1 Stat. 73.

80/ Moore's Federal Practice, Vol. 1 (2d ed.), §0.6(6), pp. 252-53.

stated:

> ... while the appellate power of this Court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe .... What [the court's appellate powers] shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not. 81/

Often cited as support for an expansive view of Congress' power to regulate the Supreme Court's appellate jurisdiction is the post Civil War

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81/ 105 U.S. 381, 385-6 (1881). In Turner v. Bank of North America, 4 U.S. (4 Dallas) 8, 10 (1799), Justice Chase stated the proposition thusly:

> The notion has frequently been entertained, that the federal Courts derive their judicial power immediately from the Constitution; but the political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to congress. If congress has given the power to this Court, we possess it, not otherwise; and if congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the Federal Courts, to every subject, in every form, which the constitution might warrant.

Similarly, in Daniels v. Railroad Company, 70 U.S. (3 Wallace) 250, 254 (1865) the Court stated:

> The original jurisdiction of this court, and its power to receive appellate jurisdiction, are created and defined by the Constitution; and the legislative department of the government can enlarge neither one nor the other. But it is for Congress to determine how far, within the limits of capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation.

See, also, Durousseau v. United States, 10 U.S. (15 Otto) 38 (1810).

decision in Ex parte McCardle.[82] In that case, under the authority of the Reconstruction Acts, the military government had imprisoned McCardle for publishing allegedly libelous and incendiary articles in his newspaper. He then brought a habeus corpus action alleging that the Reconstruction legislation was unconstitutional and, following an adverse decision below, filed a direct appeal to the Supreme Court under the then recently passed Act of February 5, 1867.[83] After the Court had acknowledged jurisdiction but before a decision on the merits, Congress withdrew the statutory right of appeal,[84] seeking to avoid a Supreme Court determination that the Reconstruction legislation was unconstitutional.[85] The Court then declined the appeal and dismissed the case for want of jurisdiction, finding that while its appellate jurisdiction "is, strictly speaking, conferred by the Constitution . . .it is conferred 'with such exceptions and under such regulations as Congress shall make'" according to Article III, Section 2.

> We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words. [86]

Notwithstanding these assertions, however, some limitation may still attach to Congress' control of the Supreme Court's appellate jurisdiction.

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[82] 74 U.S. (7 Wallace) 506 (1868).

[83] Act of February 5, 1867, ch. 26, §1, 14 Stat. 385.

[84] Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44.

[85] See, generally, C. Fairman, The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Reconstruction and Reunion 1864-88, pt. 1, at 433-514 (P. Freund ed. 1971).

[86] 74 U.S (7 Wallace) at 514.

In Ex parte McCardle itself and subsequently in Ex parte Yerger[87] the Court emphasized that the repeal of the 1867 statute did not deprive it of all appellate power over cases involving the constitutional right of habeas corpus:

> The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised. [88]

That is, under the Judiciary Act of 1789 the Court had, prior to 1867, exercised the authority to review lower federal court decisions concerning habeas corpus, not by appeal but by a writ of certiorari. In Ex parte Yerger it was argued that the 1867 act authorizing direct appeals implicitly repealed the jurisdiction granted in the 1789 act, and that the subsequent repeal of the 1867 act deprived the Court of all appellate jurisdiction over habeas corpus proceedings. But the Court rejected the argument, stating:

> ...it is too plain for argument that the denial to this court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ, deprive the citizen in many cases of its benefits and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction, exercised upon the decisions of courts of original jurisdiction. In the particular class of cases, of which that before the court is an example.... it is evident that the imprisoned citizen, however unlawful his imprisonment may be in fact, is wholly without remedy unless it be found in the appellate jurisdiction of this court.
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> These considerations forbid any construction giving to doubtful words the effect of withholding or abridging this jurisdiction. [89]

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[87] 75 U.S. (8 Wallace) 85 (1869).

[88] 74 U.S. (7 Wallace) at 515.

[89] 75 U.S. (8 Wallace) at 102-103.

The Court deemed the sudden withdrawal of jurisdiction in McCardle to be justified by "some imperious public exigency ... within the constitutional discretion of Congress to determine....[90] But it refused to construe the 1867 and 1868 statutes as withdrawing

> ...the whole appellate jurisdiction of this court, in cases of habeas corpus, conferred by the Constitution, recognized by law, and exercised from the foundation of the government hitherto....[91]

A principle implied by Article III and unaffected by McCardle is the separation of powers doctrine that may limit Congress in the exercise of its power to regulate Federal court jurisdiction. The requirement of an independent judiciary was directly addressed by the Court in a post-McCardle decision, United States v. Klein,[92] which concerned the effect to be given Presidential pardons of those who had aided and abetted the rebellion during the Civil War. The Captured and Abandoned Property Act authorized suit in the Court of Claims for the return of seized Confederate property on proof that the claimant had given no aid or comfort to the rebellion. In United States v. Padelford[93] the Supreme Court had ruled that the statute was satisfied when the claimant had received a pardon under a Presidential general amnesty. Thereafter Congress, while appeal in the Kline case was pending, enacted a rider to an appropriations bill providing that a Presidential pardon would not support a claim for captured property, that acceptance without disclaimer of a pardon for participation in the rebellion was conclusive evidence that the claimant had aided the enemy, and that when the

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[90] 75 U.S. (8 Wallace) at 104.

[91] 75 U.S. (8 Wallace) at 106.

[92] 80 U.S. (13 Wallace) 128 (1871).

[93] 76 U.S. (9 Wallace) 531 (1870).

Court of Claims based its judgment on such a pardon the Supreme Court lacked jurisdiction of the appeal.

In Klein, the Supreme Court held this statute unconstitutional as infringing the power of both the judiciary and the President. Although recognizing that Congress had the power under Article III to confer or withhold the right of appeal from the Court of Claims, the Court held that the proviso was not within "the acknowledged power of Congress to make exceptions and prescribe regulation to the appellate power" because it intruded upon the independence of the judicial branch and amounted to a "rule of decision, in causes pending, prescribed by Congress. . ."

> What is this [the act] but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants . . .Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it? We think not. . .We must think that Congress has inadvertently passed the limit which separates the legislative from judicial power. It is of vital importance that these powers be kept distinct. [94/]

The Klein decision, which was cited with approval by the Court in its 1962 ruling in Glidden Co. v. Zdanok,[95/] suggests that Congress must exercise its power to limit jurisdiction in a manner consistent with the independence of the judiciary.

[94/] 80 U.S. (13 Wallace) at 145-147. With respect to the powers of the Presidency, the Court found the pardoning power to be granted "without limit" to the Executive and held the Congressional provision to be an unconstitutional impairment of that independent power.

[95/] 370 U.S. 530 (1962).

Other cases suggest further possible limitations based on the supremacy clause of Article VI of the Constitution, which states:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

It could be argued that this constitutional provision would be a nullity if there were not a single supreme tribunal with the authority to interpret and pronounce on the meaning of the Constitution and of Federal law. Thus, Justice Taney, in Ableman v. Booth,[96] stated:

> But the supremacy thus conferred on this Government [by the supremacy clause] could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place...and the Constitution and laws and treaties of the United States, and the powers granted to the Federal Governmemt, would soon receive different interpretations in different States and the Government of the United States would soon become one thing in one State and another thing in another. It was essential, therefore, to its very existence as a Government, that...a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, should be finally and conclusively decided...And it is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the General Government in the sphere of action assigned to it; [and] to make the Constitution and laws of the United States uniform, and the same in every State.... 97/

With even more dramatic flourish Justice Story justified Supreme Court review of State court decisions as follows:

96/ 62 U.S. (21 Howard) 506 (1858).

97/ 62 U.S. (21 Howard) at 517-18.

> A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution... [T]he appellate jurisdiction must continue to be the only adequate remedy for such evils. [98]

In other words, a Supreme Court with authority to review and revise lower and State court judgments may be constitutionally necessary to assure the national uniformity and supremacy of the Constitution and federal law.[99]

Another argument related to the above stems from the due process clause.[100] If appellate review by the Supreme Court were denied in cases involving a constitutional right, and if as a consequence different interpretations of the law developed in the various States or Federal judicial circuits, then the effect would be unequal treatment of persons similarly situated. That is, persons asserting the same right would be treated differently in different jurisdictions. This result, it has been suggested, would be "a manifest abuse of due process, one of the bases of which is equal treatment before the law."[101/] Thus, appellate review may be a necessary consequence of due process, "if such an appeal is necessary to secure uniform treatment before the law."[102/]

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[98] Martin v. Hunter's Lesse, 14 U.S. (1 Wheaton) 304, 347-48 (1816).

[99] For fuller development of this argument, see Ratner, "Congressional Power over the Appellate Jurisdiction of the Supreme Court," University of Pennsylvania Law Review 109: 157, 160-67 (1960). In Hart and Wechsler's famous dialogue on Congress' power over the jurisdiction of the Federal courts, the limitation asserted as to Congress' power over the Supreme Court's appellate jurisdiction is simply that "...the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan." Bator, Mishkin, Shapiro, and Wechsler, Hart and Wechsler's The Federal Courts and the Federal System , (2nd ed., 1973), p. 133.

[100] Sedler, "Limitations on the Appellate Jurisdiction of the Supreme Court," 20 University of Pittsburg Law Review 99, 113, 114 (1958).

Thus, the cases may provide less forceful precedent for the limitations imposed by S. 528 as they relate to the Supreme Court's appellate jurisdiction than the original jurisdiction of the inferior Federal courts. With the exception of McCardle, all of the cases have involved legislative limits on judicial authority with respect to claims arising from the common law or Federal statute. McCardle and Yerger, on the other hand, establish only that Congress can extinguish one means for obtaining appellate review of an asserted constitutional right when other means remain open, or conversely, that the courts will narrowly construe jurisdictional statutes when to do otherwise would have the effect of eliminating all remedies for a constitutional violation. In addition, Klein suggests that the Supreme Court may be less receptive to congressional mandates that intrude upon judicial independence by prescribing the manner in which the merits of a particular claim are to be viewed. Finally, fundamental constitutional limitations on Congress' power may derive from the Supreme Court's essential function in giving uniformity and national supremacy to Federal law or from due process demands that the enforcement of constitutional rights not depend on geographical location in the United States. But because of the infrequency with which Congress has acted to limit the Court's appellate jurisdiction in

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[101/] Id., at 113.

[102/] Id., at 114.

the past, and the consequent dearth of case law, the contours of Congress' power remain largely undetermined.

It could be argued, however, that these constraints on Congress' power lose some of their force given the nature of the limitations imposed by the bill. That is, the bill would affect the Supreme Court's appellate jurisdiction only with respect to the implementation of certain school desegregation remedies, but would not otherwise restrict its authority to review the constitutionality of school officials' actions alleged to deny equal protection of the laws, or to order such other relief as may be appropriate to remedy any violation found to exist. This relief could even include the busing of students to the extent authorized by the bill. In addition, relief beyond that available in the Federal courts could be obtained by litigants in State courts which would remain open to school desegregation suits. The Supreme Court decisions in Swann and its progeny would continue to stand as controlling precedent in this area, presumably binding on State court judges as they ruled in related cases. In this regard, one noted commentator has suggested:

> There is, to be sure, a school of thought that argues that 'exceptions' has a narrow meaning, not including cases that have constitutional dimension; or that the supremacy or the due process clause of the fifth amendment would be violated by an alteration of the jurisdiction motivated by hostility to the decisions of the Court. I see no basis for this view and think it antithetical to the plan of the Constitution for the courts--which was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by the Constitution as 'the supreme Law of the Land. . .any Thing in the Constitution or laws of any State to the Contray notwithstanding.' Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of the government. They do so rather for the reason that they must decide a litigated

> issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land. This is, at least, what Marbury v. Madison was all about. I have not heard that it has yet been superceded, though I confess that I read opinions on occasion that do not exactly make its doctrine clear. [103]

Supporting Professor Wechsler's view is the fact that the Supremacy Clause and uniformity arguments sanctioned by the Court in Martin v. Hunter's Lessee (supra) and other early cases were based on an interpretation of the jurisdiction affirmatively granted or recognized by Congress in the Judiciary Act of 1789. Whether these arguments would have independent constitutional force against a Congressional denial of jurisdiction has yet to be adjudicated.

A final consideration that may affect the constitutionality of the bill under Article III is the separation of powers limitation enunciated in Klein. The Klein principle, precluding attempted congressional interference with the judiciary in the decision of pending cases, could have implications for the bill's limitations on judicial use of busing remedies. This may be particularly so as applied in suits by the Attorney General under §4 to reopen previously decided cases for retroactive enforcement of those remedial limits. Indeed, even more compelling reasons may support invocation of the Klein doctrine in the latter circumstances since it could be argued that Congress is attempting to alter or postpone the equitable effect of prior court decrees, and because of the heavy burden the duty to relitigate would place on the judicial process. In Pope v. United States,[104] the Supreme Court declined to decide under what conditions the Klein holding also prohibits a congressional act from setting aside a judgment in a case already decided. "We do not consider just what application the principles announced in the Klein case could rightly be given to a case in which Congress sought, pendente lite, to set aside a judgment of the Court of Claims in favor of the Government and require relitigation of the suit." However, the Court's recent decision in United States v. Sioux Nation of Indians[105/] suggests that the mere fact that a congressional enactment requires relitigation of a previously decided case may not violate the separation of powers doctrine provided that the act is otherwise within Congress' constitutional powers.

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[103] Wechsler, "The Courts and the Constitution," 65 Columbia L. Rev. 1001, 1005-6 (1965).

[104] 323 U.S. 1, 8-9 (1944).

Sioux Nation involved an act passed by Congress in 1978 waiving the res judicata effect of a prior judicial decision which had rejected a claim that Congress' 1877 ratification of an agreement ceding the Great Sioux Reservation, including the Black Hills, in violation of the Fort Laramie Treaty of 1868, effected a taking of Sioux lands without due process. The 1978 Act directed the Court of Claims to review de novo the merits of the Black Hill's taking claims without regard to the defense of res judicata. In holding that the statutorily mandated duty to relitigate the Sioux claims did not violate the doctrine of separation of powers, Justice Blackmun wrote for the Court:

> When Congress enacted the amendments directing the Court of Claims to review the merits of the Black Hills claim, it neither brought into question the finality of that court's judgments, nor interfered with that court's judicial function in deciding the merits of the claim. When the Sioux returned to the Court of Claims following passage of the amendment, they were in pursuit of judicial enforcement of a new legal right. Congress had not 'reversed' the Court of Claims' holding that the claim was barred by res judicata, nor, for that matter, had it reviewed the 1942 decision rejecting the Sioux claim on the merits. As Congress explicitly recognized, it only was providing a forum so that a new judicial review of

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[105/] 48 U.S.L.W. 4960 (S.Ct. 6/24/80).

> the Black Hills claim could take place. This review was to be based on the facts found by the Court of Claims after reviewing all the evidence, and an application of generally controlling legal principles to those facts. For these reasons, Congress was not reviewing the merits of the Court of Claims' decisions, and did not interfere with the finality of its judgments. 106/

The legislation upheld in the Sioux Nation case, however, may be distinguishable from S. 528 in several relevant particulars. First, as observed by Justice Blackmun, the Act there did not purport to resolve the outcome of the Court of Claims new review of the merits of the claim. The remedial limits imposed by the bill, on the other hand, may be outcome determinative in the sense of requiring a court to devise a new remedy utilizing less student busing than previously ordered. Secondly, Sioux Nation involved a claim against the United States and the Court found that the 1978 Act was a valid exercise of Congress' power to condition waivers of sovereign immunity of the United States. Finally, Justice Blackmun also found that the waiver of res judicta was within Congress' power under §8 of Article I of the Constitution to provide for payment of the Nation's debts. Accordingly, it is possible that the Court would take a different view with respect to retroactive application of the busing limitations in S. 528.

Related to Klein is a principle implied by several early decisions that the Article III guarantee of an independent judiciary prevents the legislature and the executive from reviewing a judicial decision. 107/ Chief Justice Taney,

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106/ 49 U.S.L.W. at 4970.

107/ E.g. Hayburns Case, 2 U.S. (2 Dallas) 408 (1792); Gordon v. United States, Appendix I, 117 U.S. 697 (1885); Muskrat v. United States, 219 U.S. 346, 354 (1911) (citing Chief Justice Taney's draft opinion as one of "great learning"). See, also Schneiderman v. United States, 320 U.S. 118, 168-9 (1943) where Rutledge, J., concurring, commented that Congress does not have authority both to confer jurisdiction and to nullify the effects of its exercise by other jurisdictional provisions in the same statute.

for instance, argued in Gordon v. United States that the award of a remedy is an essential part of the exercise of judicial power and that rendering a judgment and yet having the remedy subject to Congressional approval is not an exercise of Article III power.[108] In Chicago & Southern Air-lines v. Waterman Steamship Corp.,[109] the Court adopted similar reasoning to deny judicial review of a presidentially reviewable order of the Civil Aeronautics Board on the ground that such dual review would violate Article III. In strong language, Justice Jackson observed that:

> Judgments within the powers vested in the courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government. [110]

Therefore, it is possible that in permitting the Supreme Court to review constitutional determinations in school desegregation cases, but denying it authority to order certain remedies, Congress may be acting beyond its powers under Article III.

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May 7, 1981

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[108] Chief Justice Taney's last judicial writing stated:

> Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without remedy . . .unless Congress should at such future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this Court, in the exercise of its appellate jurisdiction; yet it is the whole power that the Court is allowed to exercise under this act of Congress. 117 U.S. at 702.

[109] 333 U.S. 103 (1948).

[110] 333 U.S. at 113-114.

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LEGAL ANALYSIS OF THE HELMS AMENDMENT NO. 69, AS MODIFIED, TO S. 951, THE 1982 DEPARTMENT OF JUSTICE AUTHORIZATIONS ACT, REGARDING THE TRANSPORTATION OF STUDENTS

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July 2, 1981

LEGAL ANALYSIS OF THE HELMS AMENDMENT NO. 69, AS MODIFIED, TO S. 951, THE 1982 DEPARTMENT OF JUSTICE AUTHORIZATIONS ACT, REGARDING THE TRANSPORTATION OF STUDENTS

On June 22, 1981, Senator Helms, on behalf of himself, Senator Johnston, and several of their colleagues, submitted a modification to an earlier Helms amendment, No. 69, that would prohibit the Department of Justice (DOJ) from using any funds authorized by S. 951 to "bring or maintain" actions to require student busing for school desegregation purposes. The original version of the Helms amendment included language passed by the House on June 9[1] and provides as follows:

> No part of any sum authorized to be appropriated by this Act shall be used by the Department of Justice to bring or maintain any sort of action to require directly or indirectly the transportation of any student to a school other than the school which is nearest the student's home, except for a student requiring special education as a result of being mentally or physically handicapped. [2]

As modified, the Helms amendment would retain this provision and, in addition, incorporate a new section 2.5, entitled the "Neighborhood School Act of 1981." The language of this new section is based on a bill, S. 528, introduced earlier this year by Senator Johnston in somewhat revised form,[2a] and would impose limits, in terms of time and distance of travel, on the amount of student busing that could be ordered by the Federal courts in school desegregation cases. The legal implications of the original Helms language, noted above, are extensively analyzed in a related report by the American Law Division[2b] and will not be treated separately here. Accordingly, the remainder of this report will consider the legal and constitutional implications of the revised "Neighborhood School Act of 1981" (hereinafter referred to as NSA) contained in the modified Helms amendment.

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[1] See, 127 Cong. Rec. H 2796-2780 (daily ed. 6/9/81).

[2] 127 Cong. Rec. S 6274 (daily ed. 6/17/81).

[2a] See, 127 Cong. Rec. S 6644-45 (daily ed. 6/22/81)

Section 2.5(b) of the NSA contains a declaration of Congressional findings to wit: that court ordered transportation of students beyond the public school "closest to their residences" has been an "ineffective remedy" frequently resulting in an "exodus" of children and loss of community support for public school systems; that such transportation is "expensive and wasteful of scarce supplies of petroleum fuels;" and that student busing "to achieve racial balance" has been "overused" by the courts, is "educationally unsound," and actually causes racial imbalances in the schools "without constitutional or social justification." Accordingly, §2.5(b) concludes by stating that the assignment of children to their "neighborhood public school" is "the preferred method of public school attendance and should be employed to the maximum extent consistent with the Constitution of the United States."

To implement this congressional policy, §2.5(d) of the NSA would add a new subsection (c) to 28 U.S.C. 1651[2c/] providing that, except in certain limited circumstances,

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[2b] The Helms amendment, as it relates to the enforcement authority of the Department of Justice, and identical language proposed by Representative Collins in the House was first adopted by both the House and Senate last year before being eliminated in conference on H.R. 7584, the Department of State, Justice, Commerce, Judiciary, and Related Agencies Appropriations bill. For an analysis of these measures, which is equally pertinent to the pending version, see, CRS Report, "Legal analysis of Legislative Rider to H.R. 7584, the Departments of State, Justice, Commerce, Judiciary, and Related Agencies Appropriations Bill, Regarding the Transportation of Students," by Charles Dale, December 1, 1980.

> No court of the United States may order or issue any writ ordering directly or indirectly any student to be assigned or to be transported to a public school other than that which is nearest to the student's residence. . .

The bill provides for exceptions to this general limitation on judicial authority where more extensive transportation is required by a student's attendance at a "magnet," vocational, technical, or other specialized instructional program, is related "directly or primarily" to an "educational purpose," or is otherwise "reasonable." However, no such transportation requirement shall be considered reasonable if alternatives less onerous in terms of "time in travel, distance, danger, or inconvenience" are available. The cross-district busing of students would also be deemed unreasonable. Nor would a transportation plan be "reasonable" where it is "likely," presumably because of white flight or otherwise, to aggravate existing "racial imbalance" in a school system, or to have "a net harmful effect on the quality of education in the public school district." Finally, §2.5(d) would make it unreasonable, and therefore bar the courts from ordering, the bus transportation of any student that exceeds thirty minutes "total actual daily time" or ten miles "total actual round trip distance" unless required for the student's attendance at the "public school closest" to his or her residence.

[2c/] This section currently provides:

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Section 2.5(f) of the proposed act would amend Title IV of the 1964 Civil Rights Act[2d] to authorize the Attorney General, on complaint by a student or his parent that "he has been required directly or indirectly to attend or be transported to a public school in violation of the Neighborhood School Act,"to initiate a civil action in Federal district court to enforce these limitations." Before instituting such action, the Attorney General must certify that the complaint is meritorious, and that the complainants are unable to maintain an appropriate action for relief. In addition, §2.5(g) would effectively permit the Attorney General to use this enforcement authority to "reopen" previously decided cases to secure compliance with the mandated transportation limits by providing that a violation of the act

> shall be deemed to have occurred whether or not the order requiring directly or indirectly such transportation or assignment was entered prior to or subsequent to the effective date of this Act.

The Attorney General is authorized to implead as defendant such parties as may be necessary to the grant of effective relief.

As is apparent from the prefatory findings, the basic legislative objective of the proposed act is to, in effect, constitutionalize the "neighborhood school" by imposing strict statutory limits on the power of the Federal courts to order the transportation of any student beyond the "closest" public school to his or her residence in desegregation cases. For purposes of the act, it is indifferent whether the order or plan is directed to elimination of segregation _de jure_ in origin, that is, that caused by the intentional actions of school officials and traditionally condemned as a violation of the Equal Protection Clause of the Fourteenth Amendment, or _de facto_ and resulting without the complicity of State or local officials. Accordingly, the NSA would make attendance at the neighborhood school the preferred method of student assignment, valid for all purposes under Federal law, and would sanction judicial departures from this policy only where it did not require transportation beyond prescribed limits, in either the time or distance of travel, unless required for a student's attendance at the school closest to his or her home. As such, it would not affect the authority of the courts to enforce remedies in school desegregation cases involving the reassignment between schools or the reformulation of school attendance boundaries which do not place a greater transportation burden on any affected child. Nor would the bill interfere with the use of other commonly employed desegregation remedies, such as voluntary majority to minority transfers, the establishment of "magnet" schools, or the remedial assignment of faculty and staff. It is possible, however, that school closings or new school construction policies mandated by Federal court order prior to enactment of the NSA to effect the transfer of students to schools outside their home neighborhoods might be negated by the retroactive application of the act's busing limitations under §2.5 (e) and (g). Beyond this, the NSA would impose significant restrictions on Federal authority to impose other "affirmative" remedies to redress conditions of State sanctioned segregation violative of equal proprotection guarantees.

[2d] 42 U.S.C. 2000c et seq.

Before proceeding further, however, it should be noted that certain language in the act could invite a narrow judicial interpretation of the busing limitations with a view to reconciling them with existing authority under the Fourteenth Amendment. For instance, the congressional finding in §2.5(b)(4) that neighborhood public schools "should be employed to the maximum extent consistent with the Constitution of the United States" (emphasis added) finds a statutory parallel in the Scott-Mansfield amendment to Title II of the 1974 Education Amendments. That provision qualified a restriction on court ordered busing beyond the school "closest or next closest" to the home by stating that nothing in that Act "is intended to modify or diminish the authority of the courts of the United States to enforce fully the Fifth and Fourteenth Amendments to the Constitution of the United States."[2e] Taking a cue from the Scott-Mansfield language, the busing limitations in Title II were subsequently held by the courts not to bind judicial authority in cases involving constitutional violations, that is, where there has been a finding of de jure segregation. Thus, in Dayton Board of Education v. Brinkman[2f] the Sixth Circuit pointed to the statement of congressional finding in §1702(b) in refusing to adhere to the "next closest school" limitation and ruled that the 1974 Act, taken as a whole, restricted "neither the nature nor scope of the remedy for constitutional violations in the instant case."

It is also possible that the Helms restriction on DOJ participation in busing cases could, at least in certain instances, come in conflict with the authority granted the department to institute enforcement actions under the NSA. For while Helms would bar the department's participation in any suit to compel student transportation beyond the school closest the home, the NSA would permit departmental action to conform outstanding judicial busing orders with the prescribed time and distance limitations. Since the NSA permits the transportation of students for up to ten miles or thirty minutes, even where that exceeds what is required for the student's attendance at the school nearest his or her home, the department might be prohibited by Helms from doing what the NSA mandates. Of course, the courts could, in an effort to avoid this anomolous result and give effect to both provisions, read Helms as not applying to suits brought by the department seeking relief for persons who claim that their rights under the NSA have been violated by excessive judicial busing orders. The net result might then be, however, that DOJ would be precluded from bringing suit in the first instance on behalf of persons seeking judicial enforcement of school desegregation by busing to the extent permitted by the Act, while it could act to seek relief for others complaining of excessive busing under a desegregation order already in force. By selectively exempting a substantive category of cases, and allocating Federal law enforcement authority within DOJ in a manner that arguably could result in different treatment of individuals seeking enforcement of the same Federal right (i.e., the right to desegregation by "reasonable" transportation means), the modified Helms amendment might be open to challenge on Due Process and Equal Protection grounds.

[2e] See, 20 U.S.C. 1702(b).

[2f] 518 F. 2d 853 (6th Cir. 1975), cert. denied 423 U.S. 1000 (1976). See, also, Morgan v. Kerrigan, 530 F. 2d 401 (1st Cir.), cert. denied 426 U.S. 935 (1976); Hart v. Community School Board, 512 F. 2d 37 (2d Cir. 1975);

Barring these or similar judicial interpretations of the NSA's language, it may be appropriate, in order to more fully appraise its legal and constitutional implications, to review the course of Supreme Court decisions stemming from Brown v. Board of Education.[3/] In Brown the Court held that the Equal Protection Clause forbade State policies mandating the separation of students in the public schools on the basis of race. In striking down State statutes which required or permitted, by local option, separate schools for black and white children, the Court declared that the "separate but equal" doctrine announced in Plessy v. Ferguson[4/] had no place in public education.

But over the next two decades, the nature of the obligation placed on school officials evolved from the mere cessation of overt racial assignment, the target of Brown, to elimination of the "effects" of the former dual system. In Green v. County Board of Education[5/] the Court held that school officials had an "affirmative duty" to abolish the "last vestiges" of a dual school system, including all "racially identifiable" schools. In addition to the racial composition of their student bodies or staffs, schools could be racially identifiable by comparison with other schools in the district if the quality of their physical facilities, curricula, or personnel differ significantly. Although there

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[3/] 347 U.S. 483 (1954).

[4/] 163 U.S. 537 (1895).

[5/] 391 U.S. 430, 438-9 (1968). In Green, the Court declared that "[s]chool boards. . .operating state compelled dual school systems [are] nevertheless charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination [is] eliminated root and branch." This affirmative duty requires the "school board today. . .to come forward with a plan that promises realistically to work, and promises reaslistically to work now." See, also, Alexander v. Holmes County Board, 396 U.S. 19 (1969).

is no duty to make schools identical in all respects, there is a "presumption" against schools that are one race or "substantially disproportionate" in racial composition, or that otherwise diverge markedly from the norm defined by these criteria. Thus, the Court in Swann v. Board of Education[6] and later cases[7] held that such differences between schools in a former statutory dual system establishes a prima facie case that school officials are continuing to discriminate or that they have failed in their duty to remedy fully the effects of past discrimination. Since the 1973 ruling in the Denver case, Keyes v. School District No. 1,[8] it is also clear that the same affirmative constitutional duty attaches where de jure segregation in a "meaningful portion" of the system results from intentional school board policies in a district without a prior history of statutory dual schools.

The Court in Swann sought to define the scope of judicial authority to enforce school district compliance with this constitutional obligation and set out "with more particularity" the elements of an acceptable school desegregation plan. With respect to the assignment of pupils, the Court stated that in eliminating illegally segregated schools, the "neighborhood school" or any other student assignment plan "is not acceptable because it appears to be neutral." Rather, in a system that is de jure segregated, a constitutionally adequate plan may require "a frank--and sometimes drastic--gerrymandering of school districts and attendance zones," resulting in zones "neither compact nor continguous, indeed they may be at opposite ends of the city." Accordingly, the Federal courts may require school officials to implement plans involving "gerrymandering of school districts. . .[and] 'pairing,' 'clustering,' or 'grouping' of schools with attendance assignments made deliberately to accomplish the transfer of Negro students out of formerly Negro schools and transfer of White students to formerly all-Negro schools."[9/]

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[6] 402 U.S. 1 (1971).

[7] Columbus Board of Education v. Penick, 443 U.S. 449 (1979); Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979).

[8] 413 U.S. 189 (1973).

A related aspect of the Swann decision was its qualified endorsement of student transportation as a desegregation remedy. The Court cautioned that "the permissible scope of student transportation" could not, because of the "very nature" of the desegregation process, be precisely defined "for the infinite variety of problems presented in thousands of situations." Nonetheless, finding that "[d]esegregation plans cannot be limited to the walk-in school," the Court held that, "as a normal and accepted tool of educational policy," busing for desegregation purposes could, subject to certain limitations, be employed "where the assignment of children to the school nearest their home would not produce an effective dismantling of the dual system." While suggesting limits, however, the Court declined to provide any "rigid guidelines" for future cases, saying only that busing could be used where "feasible," and that its use was to be limited by considerations of times and distances which would "either risk the health of the children or significantly impinge on the educational process."[10/] In addition, limits on time of travel would vary with many factors, "but probably with none more than the age of the students."[11/]

Three companion cases decided by the Court on the same day as Swann also addressed the judicial use of remedial student assignments and busing in school

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[9/] 402 U.S. at 27.

[10/] 402 U.S. at 30-31.

[11/] 402 U.S. at 31.

desegregation cases. In Davis v. Board of School Commissioners[12] the Court reversed the Fifth Circuit Court of Appeals for failing to achieve adequate desegregation of Mobile County, Alabama. The Fifth Circuit had affirmed a desegregation order that did not require busing of students across a major highway which divided Mobile into district zones. The Supreme Court's reversal was critical of the appeals court decision because "inadequate consideration was given to the possible use of bus transportation and split zoning."

> As we have held, 'neighborhood school zoning,' whether based strictly on home-to-school distance or on 'unified geographic zones' is not the only constitutionally permissible remedy; nor is it *per se* adequate to meet the remedial responsibilities of local boards. Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. A district court may and should consider the use of all available techniques including restructuring of attendance zones and both continguous and noncontinguous attendance zones. [citing Swann]. The measure of any desegregation plan is its effectiveness.[13]

In McDaniel v. Barresi[14] the Court reversed a ruling of the Georgia State Supreme Court that a school desegregation plan imposed by the former Department of H.E.W. under Title VI of the 1964 Civil Rights Act violated the rights of white students and their parents because it treated students differently on account of race. The Court held that in compliance with its duty under Green and Swann to convert to a unitary system, the local board of education of Clark County, Georgia had properly considered the race of the students in fixing school attendance boundaries.

> In this remedial process, steps will almost invariably require that students be assigned 'differently because

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[12] 402 U.S. 33 (1971).

[13] 402 U.S. at 37.

[14] 402 U.S. 39 (1971).

> of their race.' [citation omitted] Any other approach would freeze the status quo that is the target of all desegregation processes. [15]

Finally, in North Carolina Board of Education v. Swann,[16] the Court held unconstitutional North Carolina's anti-busing law, which forbade the assignment or transportation of any student on the basis of race or for the purpose of achieving racial balance in the public schools. The State statute was found to prevent implementation of desegregation plans required by the Fourteenth Amendment and was therefore unconstitutional. According to Chief Justice Burger, "[b]us transportation has long been an integral part of all public school systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it."[17]

In his ruling on application for a stay order in Winston-Salem/Forsyth County Board of Education v. Scott,[18] Chief Justice Burger, sitting as Circuit Justice, offered some additional indication of the limits imposed by Swann on student busing. The Chief Justice found "disturbing" the district court's apparent agreement with the school board that Swann required that each school have a proportion of blacks and whites corresponding to the proportion prevailing in the system as a whole. He denied the stay application, but only after chastising the board for being vague in its reference to "one hour average travel time," and indicated, "by way of illustration," that three hours would be "patently offensive" when school facilities are available at a lesser distance. The Chief Justice also stressed that he would be disposed to grant the application for stay if it had been made earlier and seemed especially concerned that the court's order called for 16,000 more students to be transported in 157 more buses, nearly double the number before adoption of the plan.

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[15] 402 U.S. at 41.

[16] 402 U.S. 42 (1971).

[17] 402 U.S. at 46.

[18] 404 U.S. 1221 (1971).

Short of the presumptive upper limit of three hours suggested by the Chief Justice in Winston-Salem/Forsyth case, and the broad health and safety limitations noted in Swann, there appear to be no hard and fast rules as to the time or distance of travel that will be permitted. As in other equity cases, the lower Federal courts were vested by Swann with "broad discretion" to determine, in the first instance, what specific measures may or may not be necessary to achieve "the greatest possible degree of actual desegregation" in a given case. Thus, for example, in Mannings v. Board of Public Instruction,[19] the Fifth Circuit approved a plan to desegregate the Tampa, Florida schools which required the transportation of some 20,000 additional students for bus rides averaging 45 minutes to 1 1/2 hours one way. On the other had, the Sixth Circuit in the Memphis case,[20] where total desegregation could have been accomplished by a plan involving bus rides up to 60 minutes, affirmed a plan which left some 25,000 black students in 25 all-black schools, but which reduced the average bus ride to 38 minutes each way, with no rides over 45 minutes in length. The courts in several other cases have attempted to gauge the extent of required busing to that involved in the Swann case. Under the plan approved by the Supreme Court in Swann, trips for elementary school students averaged about seven miles and the trial court had found that they would take "not over 35 minutes at most." The Supreme Court noted that this compared favorably with the transportation plan previously operated in Charlotte under which each day 23,600 students on all grade levels were transported an average of 15 miles one way for an average trip requiring over an hour.[21]

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[19] 427 F. 2d 874 (5th Cir. 1971).

[20] Northcross v. Board of Education, 341 F. Supp. 583 (W.D. Tenn. 1972), aff'd 489 F. 2d 15 (6th Cir. 1973), cert. denied. 416 U.S. 962 (1974).

As this sampling of cases suggests, it is impossible to determine in advance the impact of the NSA's restrictions, in any particular case, on the courts' discretion to order relief necessary for compliance with the remedial principles of Swann and related cases. This is particularly so because, in addition to the time and distance limitations in §2.5(d), the NSA employs other non-quantitative, and perhaps unquantifiable, restrictions on judicial authority to order student transportation. For example, irrespective of considerations of travel time or distance, the NSA would preclude transportation orders that are "likely" to aggravate "racial imbalance" in the system, because of white flight or otherwise, or to have "a net harmful effect on the quality of education" in the system, or where "reasonable alternatives" exist. In some cases, the Swann standards might be met without requiring busing beyond the limits imposed by the NSA, but in the circumstances of the Swann case itself, and a substantial number of cases where it has been employed, some more extensive busing might be required to desegregate schools to the extent mandated by current constitutional standards. In these cases, the courts would be effectively restrained from fully exercising the equitable discretion they possess under existing precedent. To the extent that NSA may vary from or alter the remedial powers of the courts in school desegregation cases, its constitutional validity may depend on the reach of Congress' authority under §5 of the Fourteenth Amendment, which is cited as authority in §2.5(c) of the NSA,[22] to define the scope of equal protection guarantees. Another potential source of legislative authority for the proposed restrictions may derive from Article III of the Constitution which grants Congress the power to restrict the original jurisdiction of the lower Federal courts and the appellate jurisdiction of the Supreme Court in certain cases. The remainder of this report analyzes both these sources in relation to Congress' power to enact the busing limitations in.

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[21] See, e.g., Vaughn v. Board of Education of Prince George's County, 355 F. Supp. 1051 (D. Md. 1972), aff'd 468 F. 2d 894 (4th Cir. 1973) (maximum busing time of 35 minutes per pupil, with mean average of 14 minutes per one-way bus trip compared with 35 minute maximum in Swann though that represented a reduction in maximum one-way bus trips prior to desegregation in that case); Brewer v. School Board of City of Norfolk, Va., 456 F. 2d 943 (4th Cir.), cert. denied 406 U.S. 905 (1972) ("30 minutes each way" not "substantially different" from that required by Swann); Moss v. Stamford Board of Education, 365 F. Supp. 675 (D. Conn. 1973) (plan provided "maximum time to be spent on the buses by any child is 34 minutes--slightly less than the maximum time in the Swann case and therefore acceptable"); Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975), aff'd 530 F. 2d 401 (1st Cir. 1976) (under final plan approved for the Boston schools "the average distance from home to school will not exceed 2.5 miles, and the longest possible trip will be shorter than 5 miles" with travel time averaging "between 10 and 15 minutes each way, and the longest trip will be less than 25 minutes").

II.

Section 5 of the Fourteenth Amendment vests with Congress the "power to enforce, by appropriate legislation, the provisions of this article." The first significant recognition of Congress' role in the definition of constitutional rights and implementing remedies under §5 is found in Katzenbach v. Morgan[23] which interpreted the section as a "positive grant" to Congress of "the same broad powers expressed in the Necessary and Proper Clause." The Supreme Court there held that §4(e) of the Voting Rights Act of 1965, which invalidated a New York literacy requirement for voting as applied to Puerto Rican residents educated in American Flag schools, was appropriate legislation under §5. This was so despite the Court's own refusal, in Lassiter v. Northampton Election Board,[24] to strike down State literacy requirements for voting as a violation of the Equal Protection Clause in the absence of any discriminatory use of the test. To be appropriate legislation, §4(e) had to be "plainly adopted to the end" of enforcing equal protection and "not prohibited by, but. . .consistent with the letter and spirit of the Constitution."

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[22] Section 2.5(c) of the NSA provides: "The Congress is hereby exercising its power under Article III, section I, and under section 5 of the Fourteenth Amendment."

[23] 384 U.S. 641 (1966).

The decision in Morgan rested on two separate rationales, both involving a major extension of congressional enforcement authority under §5. First, Justice Brennan, writing for himself and five other members of the Court, with the separate concurrence of Justice Douglas, characterized §5 as a broad grant of discretionary power to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[25] In this view, Congress is empowered by §5 to enact prophylactic measures to ensure enjoyment of equal protection guarantees against the potentiality of official discrimination and to remove obstacles to the States' performance of their obligations under the amendment. As in reviewing necessary and proper clause legislation, where the Court is able "to perceive a basis" for the congressional determination, its inquiry is at an end. Here, the Court held,

> It is for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations--the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interest that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school.[26]

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[24] 360 U.S. 45 (1959).

[25] 384 U.S. at 650-51.

[26] 384 U.S. at 653.

Thus, despite the absence in the record of any actual discrimination by New York in the provision of such services, it was within Congress' power to act to insure that Puerto Ricans have the political power to enable them "better to obtain 'perfect equality of civil rights and the equal protection of the laws.'"[27/] The second branch of Morgan held that §5 confers independent authority on Congress to find that a State practice violates the Equal Protection Clause even if the Court is unwilling to make the same determination.

> Here, again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement. . .constitute[s] an invidious discrimination in violation of the Equal Protection Clause. [28/]

Accordingly, the majority in Morgan suggested not only that Congress has authority under §5 to define as well as remedy denials of equal protection but also that the courts should defer to congressional exercise of that authority.

Justices Harlan and Stewart, who joined in the only dissenting opinion, rejected both branches of the majority's rationale. They dismissed the remedial theory as inapplicable to the challenged legislation. Since §4(e) had been introduced from the floor during debate on the Voting Rights Act, there had been no investigation of legislative facts to support a finding of discrimination against Puerto Ricans in rendering of governmental services. As to the second rationale, their objection was more fundamental. The issue whether New York's denial of voting rights to those subsequently enfranchised by §4(e) violated equal protection was a judicial question which could not be resolved by Congress. A congressional determination that Spanish-speaking citizens are as capable of making informed decisions in elections as English-speaking citizens might have some bearing on that judicial decision, but in the dissenters' view,

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[27/] 384 U.S. at 653.

[28/] 384 U.S. at 656.

courts should, in interpreting the Equal Protection Clause, give no more deference to congressional judgments than those of State legislatures.[29]

The broad language of the Morgan majority might support congressional prescription of the remedial standards in NSA even if they impose limits, in terms of time or distances of travel or otherwise, on judicially ordered student transportation to effectuate public school desegregation. But this conclusion is rendered less certain by indications in Morgan that Congress may only exercise its §5 authority to facilitate the realization or extend the protections of the Fourteenth Amendment. Morgan upheld a voting eligibility standard arguably more liberal than the judicially defined constitutional requirement. A caveat to the Court's opinion in Morgan emphasized the distinction between the power to expand and the power to restrict the reach of equal protection thusly:

> Section 5 does not grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' We emphasize that Congress' power under section 5 is limited to adopting measures to enforce the guarantees of the Amendment; section 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing States to establish racially segregated systems of education would not be--as required by section 5--a measure 'to enforce'

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[29] According to the dissenters:

> . . .[W]e have here not a matter of giving deference to a congressional estimate based on its determination of legislative facts, bearing upon the validity vel non of a statute, but rather what can at most be called a legislative announcement that Congress believes a state law to entail an unconstitutional deprivation of equal protection. Although this kind of declaration is of course entitled to the most respectful consideration, coming as it does from a concurrent branch and one that is knowledgeable in matters of popular political participation, I do not believe that it lessens our responsibility to decide the fundamental issue of whether in fact the state enactment violates federal constitutional rights. 384 U.S. at 669-70 (dissenting opinion).

> the Equal Protection Clause since that clause of its own force prohibits such state laws. 30/

Accordingly, insofar as NSA would place limits on transportation remedies that could interfere with effectuation of the right to a desegregated public education as defined in the case law, it may come within this explicit exception to the Morgan doctrine.31/ In addition, Morgan concerned a congressional statute directed to certain actions by the States. The remedial standards in NSA, on the other hand, directly implicate the equitable power of the Federal courts and may, therefore, involve different considerations.32/ Finally,

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30/ 384 U.S. at 651-52, n. 10.

31/ However, Professor Charles Alan Wright, a noted constitutional scholar at the University of Texas, concluded in congressional testimony on earlier busing legislation that:

> Neither Swann nor any other Supreme Court case holds that there is a constitutional right to attend a racially balanced school or a constitutional right to be taken to school by bus for that purpose. Swann explicitly rejected the notion that the Constitution requires racial balance, 402 U.S. at 24, and recognized that one race schools may remain so long as they are not part of state-enforced segregation, 402 U.S. at 25-26. It would seem that the power of Congress to speak to the question of remedy and to say whether and under what circumstances a particular remedy is to be used, is no less for violation of the Equal Protection Clause than it is for violation of the fourth amendment, the Self Incrimination Clause, the Due Process Clause, or any other provision of the Constitution.

A Bill to Further the Achievement of Equal Educational Opportunities: Hearings on H.R. 13915 Before the House Committee on Education and Labor, 92d Cong., 2d Sess. 1163 (1972) (statement of Charles Alan Wright).

32/ In this regard, one commentator has noted:

> Whatever the reach of section 5 as a vehicle for augmenting the power of Congress to regulate matters otherwise left to the States, it provides no authority for Congress to interfere with the execution or enforcement of federal court judgments or to overturn federal judicial determinations of the requirements of the fourteenth amendment. The entire fourteenth amendment increased congressional power at the expense of the states, not of the federal courts.

Rotunda, R.D., Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing, 64 Geo. L. J. 839, 859 (1976).

the full breadth of congressional power elaborated in Morgan may not command a majority of the present court.

Four years after Morgan, the Court in Oregon v. Mitchell[33] reconsidered the breadth of congressional power under §5 within the context of the 1970 amendments to the Voting Rights Act which, inter alia, mandated a minimum voting age of 18 for all elections, State and Federal, contrary State law notwithstanding. A literal reading of Morgan suggests that the congressional determination would be upheld provided that there was a perceptible basis for concluding that the extension of the franchise to 18 years old was necessary to effectuate Fourteenth Amendment guarantees or, alternatively, that such age discrimination was an invidious classification unsupported by a "compelling state interest." However, only three Justices, Brennan, White, and Marshall, fully embraced the broad rationale of Morgan while Justice Douglas, in a partial concurrence, found simply that "Congress might well conclude that a reduction of the voting age from 21 to 18 was needed in the interest of equal protection." Justices Stewart, Burger, Blackmun, and Harlan found that Congress lacked the power under §5 to change age qualifications for State elections. The deciding vote was cast by Justice Black who found that Congress' §5 power was limited by the Constitution's delegation to the States of the power to determine qualifications for State elections.

The Court thus rejected 5 to 4 the application of the 18 year age requirement to State elections, but the conflicting rationales of the Justices served only to obscure the issue of the scope of congressional power under §5. Justice Brennan, joined by Justices White and Marshall, reasoned on the basis of the second branch of Morgan that, whatever the Court's view of excluding 18 year olds from the vote, Congress' determination was entitled to deference because "proper regard for the special function of Congress in making determinations of legislative fact compels the Court to respect those determinations unless they are contradicted by evidence far stronger than anything that has been adduced in these cases."[34] Elaborating further on the justification for judicial deference to congressional fact-finding, Justice Brennan stated:

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[33] 400 U.S. 112 (1970).

> The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication. Courts, therefore, will overturn a legislative determination of a factual question only if the legislature's finding is so clearly wrong that it may be characterized as 'arbitrary,' 'irrational,' or 'unreasonable.' [35]

A significant aspect of Justice Brennan's opinion in Oregon was its apparent reformulation of the limiting principle in Morgan predicated on the dilution of equal protection rights. Instead of the Morgan distinction between legislative dilution versus expansion, Justice Brennan emphasized as critical under §5 Congress' superior capacity to "determine whether the factual basis necessary to support a state legislative discrimination actually exists."

> A decision of this Court striking down a state statute expresses, among other things, our conclusion that the legislative findings upon which the statute is based are so far wrong as to be unreasonable. Unless Congress were to unearth new evidence in its investigation, its identical findings on the identical issue would be no more reasonable than those of the state legislature. [36]

Although not entirely clear, this statement may imply, contrary to Morgan, an indefinite power in Congress, as legislative fact-finder, to narrow the scope of equal protection and due process rights on the basis of new evidence.

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[34] 400 U.S. at 240.

[35] 400 U.S. at 247-48.

[36] 400 U.S. at 249, n. 31.

Five members of the Court took issue with Justice Brennan's position, finding various limitations on Congress' §5 power. Justice Black argued that Congress has power under §5 to override an express delegation to the States only in cases of racial discrimination.[37] Justice Harlan, after determining that the Fourteenth Amendment was not intended to reach discriminatory voter qualifications of any kind, rejected the notion that Congress has a "final say on matters of constitutional interpretation. . . as fundamentally out of keeping with the constitutional structure." Justice Stewart, joined by the Chief Justice and Justice Blackmun, read Morgan to give Congress power to do no more than "provide the means of eradicating situations that amount to a violation of the Equal Protection Clause."[38] They argued that §4(e) had been upheld on the alternative ground of remedying discrimination against Puerto Ricans in the furnishing of public services. Discrimination against Puerto Ricans was an undoubted invidious discrimination. Thus, Morgan's two branches merely allowed Congress to act upon established unconstitutionality, to impose upon the States remedies "that elaborated upon the direct command of the Constitution," and to overturn State laws if "they were in fact used as instruments of invidious discrimination even though a court in an individual lawsuit might not have reached that factual conclusion."[39] But, in their view, nothing in Morgan sustained congressional power to "determine as a matter of substantive constitutional law what situations fall within the ambit of the [equal protection] clause, and what state interests are 'compelling.'"[40]

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[37] 400 U.S. at 129.

[38] 400 U.S. at 296.

[39] 400 U.S. at 296.

The opinions of a majority of Justices in Oregon appear to have severely undermined Morgan's second rationale that §5 authorizes Congress to define the substantive reach of the Equal Protection Clause by invalidating State legislation. The first branch of Morgan, however, recognizing congressional power to act to remedy State denials of equal protection appears to have survived, at least with respect to State practices aimed at "discrete and insular" minorities.[41] As in Oregon, the Court in Fullilove v. Klutznick[42] relied on Congress' competence as legislative fact-finder to uphold a statutory remedy enacted pursuant to §5. It there approved the minority business enterprise (MBE) set aside provision in the Public Works Employment Act of 1977[43] on the basis that the program was aimed at remedying a discriminatory situation found to exist by Congress.

> With respect to the MBE provision, Congress has abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination ... Accordingly, Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection laws.[44]

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[40] 400 U.S. at 295-6.

[41] See, 400 U.S. at 129 (Black, J.). It appears that, even in Justice Stewart's view, although Congress can act only upon the "direct command of the Constitution," it can circumvent that limitation by hypothesizing the existence of racial discrimination and declaring that its enactment is necessary to correct that discrimination. See, 400 U.S. at 295, n. 14 (Stewart, J., concurring in part and dissenting in part).

[42] 100 S. Ct. 2758 (1980).

[43] 42 U.S.C. 6701 (1979 Supp.).

[44] 100 S. Ct. at 2774-75.

The distinction between rights and remedies for constitutional violations, as it relates to the power of Congress, has found expression in other contexts as well. In City of Rome v. United States,[45] the Court upheld Congress' power to enact such remedial legislation pursuant to its comparable enforcement authority under section 2 of the Fifteenth Amendment. At issue in this case was the constitutionality of the Voting Rights Act of 1965, as amended, and its applicability to electoral changes and annexations made by the city of Rome, Georgia. Such changes were deemed to have the effect of denying the right to vote on account of race or color, and thus were in violation of the Act. The Court specifically held that, "even if §1 of the Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to §2, outlaw voting practices that are discriminatory in effect."[46] The Court in City of Rome relied to a great extent on its holding in South Carolina v. Katzenbach[47] which dealt with remedies for voting discrimination. It also cited Katzenbach v. Morgan. The Court wrote:

> ... In the present case, we hold that the Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that §1 of the Amendment prohibits only intentional discrimination in voting. Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact. [48]

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[45] 446 U.S. 156 (1980).

[46] 446 U.S. at 173.

[47] 383 U.S. 301 (1966).

[48] 446 U.S. at 177.

Similarly, in Bivens v. Six Unknown Fed. Narcotics Agents,[49] the Court alluded to the power of Congress over remedies in the context of an action for damages against Federal officials for violation of Fourth Amendment rights. In holding a damage remedy implied by the constitutional prohibition against unreasonable searches and seizure, the Court sustained the action, but acknowledged its deference to Congress, noting that "we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." Chief Justice Burger, joined in dissent by Justices Black and Blackmun, urged Congress, without adverting to Morgan or Oregon, to create different rules to supplant judicially created standards to implement Fourth Amendment rights.[50] A noted legal commentator has conceived the matter as follows:

> The denial of any remedy is one thing. . . .But the denial of one remedy while another is left open, or the substitution of one remedy for another, is very different. It must be plain that Congress necessarily has a wide choice in the selection of remedies, and that a complaint about action of this kind can rarely be of constitutional dimension. [51]

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[49] 403 U.S. 388, 397, (1971).

[50] Chief Justice Burger was particularly critical of the judicially created exlusionary rule, requiring the suppression of illegally seized evidence in Federal criminal trials, and stated:

> Reasonable and effective substitutes can be formulated if Congress would take the lead, as it did for example in 1946 in the Federal Tort Claims Act. I see no insuperable obstacle to the elimination of the suppression doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials. 403 U.S. at 421.

[51] Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1366 (1953).

It is therefore possible that Congress' power under §5 to legislate remedies for judicially recognized violations of the Equal Protection Clause, as affirmed in *Morgan* and arguably preserved by *Oregon* and later cases, could be advanced in support of the restrictions on busing in the NSA. Of significance in evaluating these limits may be the language in the *Swann* decision which permits the district courts to deny busing when "the time or distance of travel is so great as to risk either the health of the children or significantly impinge the educational process."[52] The *Swann* Court also acknowledged that the fashioning of remedies is a "balancing process" requiring the collection and appraisal of facts and the "weighing of competing interests," a seemingly appropriate occasion under *Morgan* for congressional intervention. In addition, busing is only one remedy among several that have been recognized by both the courts and Congress to eliminate segregated public schools.[53] Thus, the findings in §2.5(b) of NSA relative to the harms of busing, particularly if supported by other evidence adduced in congressional hearings or debate, may comport with the emphasis of Justice Brennan's opinion in *Oregon* on

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[52] 402 U.S. at 30-31.

[53] In enacting Title II of the Education Amendments of 1974, captioned "Equal Educational Opportunities and Transportation of Students," Congress specified practices which are to be considered denials of due process and equal protection of the laws and delineated a "priority of remedies," ranging from more preferred to less preferred and even prohibited. Thus, the courts are directed to consider and make specific findings with regard to the efficacy of the following before requiring implementation of a busing plan:

> (a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;
>
> (b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

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Congress' superior fact-finding competence, and therefore be entitled to judicial deference.[54/] By contrast, the dissenters in Morgan found §4(e) of the Voting Rights Act failed to qualify as a remedial measure only because of the lack of a factual record or legislative findings.

Complicating this conclusion, however, are judicial statements implying that the elimination of busing as a remedy to the extent contemplated by the

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> (c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin;
>
> (d) the creation or revision of attendance zones or grade structures without requiring transportation beyond that described in section 1714 of this title;
>
> (e) the construction of new schools or the closing of inferior schools;
>
> (f) the construction or establishment of magnet schools; or
>
> (g) the development and implementation of any other plan which is educationally sound and administratively feasible, subject to the provisions of sections 1714 and 1715 of this title.
> 42 U.S.C. 1713.

[54/] Richard Kleindienst, Acting Attorney General, while testifying before the House Committee on the Judiciary, stated:

> The question here is the appropriate remedy for implementation of the right to a desegregated education, an area in which Congress' special fact finding expertise should be utilized. Legitimate questions that might be raised in the area are, for example: How much busing will harm the health of a child? How much may impair the educational process? How great are the benefits to children in receiving a desegregated education compared to the detriments of busing? These are essentially legislative--not judicial--questions.

Proposed Amendment to the Constitution and Legislation Relating to Transportation and Assignment of Public School Children: Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, 92d Cong., 2d Sess. 1145 (1972) (statement of Hon. Richard G. Kleindienst, Acting Attorney General of the United States).

NSA may be fraught with constitutional difficulty. For example, in North Carolina Board of Education v. Swann,[55] the Supreme Court invalidated an analogous State law restriction on busing for desegregation purposes noting that "it is unlikely that a truly effective remedy could be devised without continued reliance upon it." This, and the consistent judicial emphasis on affirmative desegregation remedies since Green, suggests that the correlative right to attend and the obligation to establish racially desegregated schools are inseparable. Accordingly, the distinction in Morgan and Oregon between constitutional rights and remedies may become blurred in the school desegregation context in those cases where student transportation, beyond the limits prescribed by the NSA , is deemed necessary for compliance with current constitutional standards. Of course, the fact that the State courts are left free by the NSA to order any form of remedy to implement a desegregation plan may be argued in reply to objections that busing may be the only effective remedy available in some circumstances. Nonetheless, because the NSA could be viewed as restricting or abrogating a remedy essential to the right to a desegregated education in such cases, and involves the issue of Congress' power vis a vis the Federal courts rather than the States as in Morgan and Oregon, substantial questions relative to the application of those precedents to congressional authority to enact NSA remain. In the final analysis, the validity of the NSA as an exercise of congressional power under §5 may depend upon whether the busing restrictions are viewed as based on a rationally supportable factual determination of the effectiveness of such remedies within the constitutional framework of Swann and related cases, or are instead a declaration of a constitutional standard in conflict with prevailing judicial standards.

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[55] 402 U.S. 43, 46 (1971).

III.

An alternative source of congressional authority for the remedial limitations imposed by NSA may reside in Article III of the Constitution which defines and delimits the judicial power of the United States. Article III does not by its terms create any of the inferior Federal courts, but instead confers that power on Congress:

> Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . [56]

Congressional power over the appellate jurisdiction of the Supreme Court is found in Article III, Section 1 which defines the original and appellate jurisdiction of the Supreme Court as follows:

> In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such exceptions, and under such Regulations as the Congress shall make.

It has sometimes been argued that the language of Article III compels Congress to vest the entire judicial power in some inferior Federal court.[57]

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[56] This Congressional power is also affirmed in Article I of the Constitution concerning the legislative power, which states:

> Section 8. The Congress shall have the Power. . .
> To constitute Tribunals inferior to the Supreme Court.

[57] Justice Story, in Martin v. Hunter's Lessee, 14 U.S. (1 Wheaton) 304, 330-331 (1816), argued:

> Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself; and if in any of the cases enumerated in the constitution, the state courts did not then possess jurisdiction the appellate jurisdiction of the Supreme Court ... could not reach those cases, and, consequently, the injunction of the constitution, that the judicial power "shall be vested" would be disobeyed. It would seem, therefore, to follow, that congress are
> "(Continued)"

But the Supreme Court has consistently construed Congress' power over the jurisdiction of the lower Federal courts to be virtually plenary. In Cary v. Curtis,[58/] for instance, the Court stated:

> ... the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good .... [T]he organization of the judicial power, in definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the legislature.

Again in Kline v. Burke Construction Co.,[59/] the Court stated:

> The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part ....

More particularly, Congress has engaged in a variety of actions with respect to the jurisdiction of the lower Federal courts, and those actions have consistently been upheld by the Supreme Court. Not until 1875, for instance, did Congress

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> bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is exclusively vested in the United States, and of which the supreme court cannot take original cognizance ... [T]he whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority.

See, also, Eisentrager v. Forrestal, 174 F. 2d 961 (D. C. Cir. 1949), reversed on other grounds sub nom. Johnson v. Eisentrager, 339 U.S. 763 (1950).

[58/] 44 U.S. (3 Howard) 236, 245, (1845).

[59/] 260 U.S. 226, 234 (1922).

vest the inferior Federal courts with general Federal question jurisdiction.[60] Moreover, the Supreme Court has consistently affirmed such Congressional actions over the jurisdiction of the lower Federal courts as (1) withdrawing jurisdiction even as to pending cases,[61] (2) delimiting lower Federal court jurisdiction over a particular cause of action to a single tribunal,[62] and (3) selectively withdrawing the jurisdiction of the lower Federal courts to adjudicate particular issues or to order particular remedies.[63]

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[60] 18 Stat. 470, Sec. 1 (Mar. 3, 1875). In 1801 Congress had briefly granted the inferior federal courts jurisdiction over "all cases in law and equity, arising under the Constitution and laws of the United States (2 Stat. 89, Sec. 11 (Feb. 13, 1801)), but a year later repealed that grant (2 Stat. 132 (Mar. 3, 1802)).

[61] Bruner v. United States, 343 U.S. 112 (1952) (amendment of statute concerning claims for service to U.S.--the Tucker Act--withdrawing federal district court jurisdiction over claims by employees as well as officers, without any reservation as to pending cases, requires dismissal of pending cases). See also De La Rama Steamship Co., Inc. v. United States, 344 U.S. 386 (1953) (general authority of Congress to withdraw federal court jurisdiction even as to pending cases affirmed, but General Savings Clause held to preserve pending claims in instant case).

[62] E.g., the Emergency Price Control Act of 1942 (56 Stat. 23) required all challenges to the validity of regulations adopted to enforce it to be brought in a single Emergency Court and barred all other Federal, state, or territorial courts from asserting jurisdiction over such challenges. The decisions of the Emergency Court were reviewable in the Supreme Court. This unusual jurisdictional scheme was held to be within Congress' constitutional power in Lockerty v. Phillips, 319 U.S. 182 (1943) and Yakus v. United States, 321 U.S. 414 (1944). Similarly, the Voting Rights Act of 1965 (79 Stat. 437, 42 U.S.C. 1973) limited jurisdiction over proceedings to terminate the coverage of the Act in a particular area to a single court in the District of Columbia, and this was upheld in South Carolina v. Katzenbach, 383 U.S. 301 (1966). See, also, the jurisdiction of the Temporary Emergency Court of Appeals as created by the Economic Stablization Act of 1970 (P.L. 91-379, 12 USC 1001) and as further defined in the Emergency Petroluem Allocation Act of 1973 (P.L. 93-159, 87 Stat. 628, 15 USC 751 et seq.) and the Energy Policy and Conservation Act of 1975. (P.L. 94-163, 89 Stat. 871).

[63] Modern examples include the Norris-La Guardia Act (47 Stat. 70, 29 USCA 101 et seq.), in which Congress restricted the jurisdiction of the Federal courts to issue restraining orders or temporary or permanent injunctions in labor disputes, upheld in Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938), and the Anti-Injunction Act (26 USCA 7421(a)), in which Congress barred all courts from entertaining suits to restrain the assessment or collection of any

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The Norris-LaGuardia Act,[64] perhaps the most celebrated modern example of Congress' exercise of its Article III powers, removed the jurisdiction of the lower Federal courts to issue a restraining order or an injunction in labor disputes. In upholding the Act's limitation, the Supreme Court in Lauf v. E.G. Shinner & Co.,[65] acknowledging that there is no constitutional right to a labor injunction, stated that "[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States." Signficantly, however, the Court had in an earlier case ruled that State legislation which imposed similar restrictions on employers' remedies constituted a denial of due process.[66]

Even more restrictive than the Norris-LaGuardia Act was the Emergency Price Control Act of 1942,[67] which operated to limit both State and lower Federal court jurisdiction. Exclusive jurisdiction to determine the validity of any regulation, order, or price schedule was vested in a new Emergency Court of Appeals and even that court was denied power to issue any temporary restraining order or interlocutory decree. The Supreme Court upheld the Act in Lockerty v. Phillips,[68] recognizing that Congress could so limit the jurisdiction

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tax, most recently upheld in Bob Jones University v. Simon, 416 U.S. 725 (1974). Earlier examples include the Judiciary Act of 1789, in which Congress excepted from the lower Federal courts' diversity jurisdiction those cases in which diversity resulted from an assignment of a chose in action, upheld in Sheldon v. Sill, 49 U.S (8 Howard) 441 (1850) and an 1839 statute in which Congress disallowed suits in assumpsit in the Federal courts against the collectors of customs duties which allegedly were assessed unlawfully, upheld in Cary v. Curtis, supra.

[64] 29 U.S.C. 101-115.

[65] 303 U.S. 323, 330 (1938).

[66] Truax v. Corrigan, 257 U.S. 312 (1921).

[67] Emergency Price Control Act, ch. 26, 56 Stat. 23 (1942).

[68] 319 U.S. 182 (1943).

of the Federal courts under Article III. In Yakus v. United States,[69] the Court was faced with a more serious constitutional challenge to the Act in the context of a criminal prosecution for its violation. The defendant, who had been convicted by an enforcement court, claimed that the denial of a stay order during his appeal to the Emergency Court deprived him of due process. In rejecting this assertion, the Supreme Court stressed that "[t]here is no constitutional requirement that that test be made in one tribunal rather than another," and that the "award of an interlocutory injunction by courts of equity has never been regarded as a matter of right." Further, the Court seemed to suggest that Congress, in protecting the public interest, could impose some burdens on individual rights:

> If the alternatives, as Congress could have concluded, were wartime inflation or the imposition on individuals of the burden of complying with a price regulation while its validity is being determined, Congress could constitutionally make the choice in favor of the protection of the public interest from the dangers of inflation. [70]

The Health Programs Extension Act of 1973[71] is further support for Congress' power to eliminate lower Federal court jurisdiction with respect to remedies. Section 401(b) of the Act provides that the receipt of Federal funds by a hospital does not *per se* authorize "any court" to require such hospital to perform any sterilization procedure or abortion if such was contrary to the hospital's religious or moral convictions. In Taylor v. St. Vincent's Hospital,[72] an action was brought against the hospital claiming that it had violated plaintiff's constitutional rights by refusing her request to undergo a sterilization procedure.

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[69] 321 U.S. 414 (1944).

[70] 321 U.S. at 439.

[71] 42 U.S.C. 300a-7(a).

[72] 369 F. Supp. 948 (D. Mont. 1973), *aff'd*, 553 F. 2d 75 (9th Cir. 1975), *cert. denied*, 424 U.S. 948 (1976).

The district court held that it did not have jurisdiction to hear the action in view of the Act, basing its decision on the power of Congress to control both the jurisdiction and the remedies of the lower Federal courts.

> There can be no doubt that Section 401(b) which restricts the course and power of inferior federal courts is a valid exercise of Congressional power. Under Article III of the Constitution, Congress can establish such inferior courts as it chooses. Its power to create those courts includes the power to invest them with such jurisdiction as it seems appropriate for the public. [citation omitted]. Further, Congress is free to legislate with respect to remedies the inferior Federal courts may grant. [citations omitted]. [73]

Thus, the language of Article III, the history of past Congressional action, and judicial interpretation of Congress' power all appear to affirm that Congress has broad authority to impose limits on the jurisdiction of the lower Federal courts, and this may be particularly so where the limitation relates to the remedial rather than adjudicatory functions of the court.[74] Although some cases have suggested that Congress' power over the jurisdiction of the lower Federal courts is limited by the taking clause of the Constitution[75] or the due process requirement that persons not be denied all judicial

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[73] 369 F. Supp. at 951.

[74] See, e.g. Glidden v. Zdanok, 370 U.S. 530, 557 (1962) where the Supreme Court approved the power of Congress to limit the equitable remedies of the Court of Claims, stating that "[n]o question can be raised of Congress' freedom, consistently with Article III, to impose such a limitation upon the remedial powers of a federal court."

[75] In the Portal-to-Portal Act of 1947 (29 U.S.C. 251-262) Congress removed Federal court jurisdiction over suits claiming overtime compensation under the Fair Labor Standards Act for activities prior and subsequent to the principal employment activity of the day. The statute was a response to a Supreme Court decision which had held such activities as walking to and from employees's work stations, changing clothes, and cleaning up to be compensable under the FLSA. (Anderson v. Mt. Clemens Pottery Co. 328 U.S. 680). In the leading case of Battaglia v. General Motors Corporation, 169 F. 2d 254 (2d Cir.) cert. denied 335 U.S. 887 (1948), the U.S. Court of Appeals for the Second Circuit held the validity of that withdrawal of Federal court jurisdiction to depend on

"(Continued)"

remedies to a claimed deprivation of a Federal right,[76] neither may be pertinent to the NSA. As in Lockerty and Yakus, the right of access to a forum where full relief may be obtained is not abrogated, it is merely reallocated. The State courts would remain open to litigants to press claims that student transportation beyond that permitted by the NSA is necessary to adequately desegregate the school system. As long as a litigant is able to proceed in State court, a viable forum exists, and there is arguably no denial of due process. In this regard, the Supreme Court has stated that "Congress could, of course, have routed all Federal constitutional questions through the State court system, saving to this Court the final say when it came to review of the state court judgments."[77] In addition, the full range of remedies authorized by the Equal Educational Opportunities Act of 1974 would be available to the lower Federal courts in desegregation cases, including the use of student transportation to the extent authorized by the NSA.

"(Continued)"

the validity of Congress' redefinition of activities compensable under the FLSA:

> We think...that the exercise by Congress of its control over jurisidiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court it must not so exercise that power as to deprive any person of life, liberty, or property without just compensation. Thus, regardless of whether subdivision (d) of section 2 (withdrawing federal court jurisdiction) had an independent end in itself, if one of its effects would be to deprive appellants of property without due process or just compensation, it would be invalid. 169 F. 2d at 257.

Nonetheless, the court upheld the withdrawal of jurisdiction.

[76] See Cary v. Curtis, supra, (McLean, J., dissenting) and Yakus v. United States, supra.

[77] Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

The NSA's restrictions as they affect the appellate jurisdiction of the Supreme Court may be more problematic, however. Article III confines Congressional power over the appellate jurisdiction of the Supreme Court to the making of "Exceptions and. . .Regulations. . .," a power seemingly less complete on its face than Congress' power to "ordain and establish" the inferior courts. Indeed, it has even been suggested that the historical evidence surrounding the exceptions clause of Article III indicates that it should be read in light of the contemporary State practice to confine regulation basically to housekeeping matters and to certain proceedings where neither error or certiorari traditions had been available.[78/] Additional uncertainty stems from the fact that since the Judiciary Act of 1789 Congress has made no attempt to sharply curtail the appellate jurisdiction of the Supreme Court, and thus the possible limits of its power have not been fully tested. This is particularly true with respect to Supreme Court review of State court decisions concerning Federal rights:

> [T]he Supreme Court has always had authority, under certain circumstances, to review a final judgment or decree of the highest court of a state in which a decision could be had, where. . .the judgment turns upon a substantial federal question. [80/]

Nonetheless, numerous statements by the Supreme Court can be found describing Congress' power over its appellate jurisdiction in as broad a terms as those used to describe Congress' power over the jurisdiction of the inferior Federal courts. For example, in The "Francis Wright," Chief Justice Waite

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[78/] See, J. Goebel, The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, p. 240 (P. Freund ed. 1971). Also, Merry, "Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis," 47 Minn. L. Rev. 53 (1962).

[79/] 1 Stat. 73.

[80/] Moore's Federal Practice, Vol. 1 (2d ed.), §0.6(6), pp. 252-53.

stated:

> ... while the appellate power of this Court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe .... What [the court's appellate powers] shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not. 81/

Often cited as support for an expansive view of Congress' power to regulate the Supreme Court's appellate jurisdiction is the post Civil War

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81/ 105 U.S. 381, 385-6 (1881). In Turner v. Bank of North America, 4 U.S. (4 Dallas) 8, 10 (1799), Justice Chase stated the proposition thusly:

> The notion has frequently been entertained, that the federal Courts derive their judicial power immediately from the Constitution; but the political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to congress. If congress has given the power to this Court, we possess it, not otherwise; and if congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the Federal Courts, to every subject, in every form, which the constitution might warrant.

Similarly, in Daniels v. Railroad Company, 70 U.S. (3 Wallace) 250, 254 (1865) the Court stated:

> The original jurisdiction of this court, and its power to receive appellate jurisdiction, are created and defined by the Constitution; and the legislative department of the government can enlarge neither one nor the other. But it is for Congress to determine how far, within the limits of capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation.

See, also, Durousseau v. United States, 10 U.S. (15 Otto) 38 (1810) decision in Ex parte McCardle.[82] In that case, under the authority of the Reconstruction Acts, the military government had imprisoned McCardle for publishing allegedly libelous and incendiary articles in his newspaper. He then brought a habeus corpus action alleging that the Reconstruction legislation was unconstitutional and, following an adverse decision below, filed a direct appeal to the Supreme Court under the then recently passed Act of February 5, 1867.[83] After the Court had acknowledged jurisdiction but before a decision on the merits, Congress withdrew the statutory right of appeal,[84] seeking to avoid a Supreme Court determination that the Reconstruction legislation was unconstitutional.[85] The Court then declined the appeal and dismissed the case for want of jurisdiction, finding that while its appellate jurisdiction "is, strictly speaking, conferred by the Constitution . . .it is conferred 'with such exceptions and under such regulations as Congress shall make'" according to Article III, Section 2.

> We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words. [86]

Notwithstanding these assertions, however, some limitation may still attach to Congress' control of the Supreme Court's appellate jurisdiction.

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[82] 74 U.S. (7 Wallace) 506 (1868).

[83] Act of February 5, 1867, ch. 26, §1, 14 Stat. 385.

[84] Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44.

[85] See, generally, C. Fairman, The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Reconstructiōn and Reunion 1864-88, pt. 1, at 433-514 (P. Freund ed. 1971).

[86] 74 U.S (7 Wallace) at 514.

In Ex parte McCardle itself and subsequently in Ex parte Yerger[87] the Court emphasized that the repeal of the 1867 statute did not deprive it of all appellate power over cases involving the constitutional right of habeas corpus:

> The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised. [88]

That is, under the Judiciary Act of 1789 the Court had, prior to 1867, exercised the authority to review lower federal court decisions concerning habeas corpus, not by appeal but by a writ of certiorari. In Ex parte Yerger it was argued that the 1867 act authorizing direct appeals implicitly repealed the jurisdiction granted in the 1789 act, and that the subsequent repeal of the 1867 act deprived the Court of all appellate jurisdiction over habeas corpus proceedings. But the Court rejected the argument, stating:

> ...it is too plain for argument that the denial to this court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ, deprive the citizen in many cases of its benefits and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction, exercised upon the decisions of courts of original jurisdiction. In the particular class of cases, of which that before the court is an example.... it is evident that the imprisoned citizen, however unlawful his imprisonment may be in fact, is wholly without remedy unless it be found in the appellate jurisdiction of this court.
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> These considerations forbid any construction giving to doubtful words the effect of withholding or abridging this jurisdiction. [89]

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[87] 75 U.S. (8 Wallace) 85 (1869).

[88] 74 U.S. (7 Wallace) at 515.

[89] 75 U.S. (8 Wallace) at 102-103.

The Court deemed the sudden withdrawal of jurisdiction in McCardle to be justified by "some imperious public exigency ... within the constitutional discretion of Congress to determine....[90] But it refused to construe the 1867 and 1868 statutes as withdrawing

> ...the whole appellate jurisdiction of this court, in cases of habeas corpus, conferred by the Constitution, recognized by law, and exercised from the foundation of the government hitherto....[91]

A principle implied by Article III and unaffected by McCardle is the separation of powers doctrine that may limit Congress in the exercise of its power to regulate Federal court jurisdiction. The requirement of an independent judiciary was directly addressed by the Court in a post-McCardle decision, United States v. Klein,[92] which concerned the effect to be given Presidential pardons of those who had aided and abetted the rebellion during the Civil War. The Captured and Abandoned Property Act authorized suit in the Court of Claims for the return of seized Confederate property on proof that the claimant had given no aid or comfort to the rebellion. In United States v. Padelford[93] the Supreme Court had ruled that the statute was satisfied when the claimant had received a pardon under a Presidential general amnesty. Thereafter Congress, while appeal in the Kline case was pending, enacted a rider to an appropriations bill providing that a Presidential pardon would not support a claim for captured property, that acceptance without disclaimer of a pardon for participation in the rebellion was conclusive evidence that the claimant had aided the enemy, and that when the

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[90] 75 U.S. (8 Wallace) at 104.

[91] 75 U.S. (8 Wallace) at 106.

[92] 80 U.S. (13 Wallace) 128 (1871).

[93] 76 U.S. (9 Wallace) 531 (1870).

Court of Claims based its judgment on such a pardon the Supreme Court lacked jurisdiction of the appeal.

In Klein, the Supreme Court held this statute unconstitutional as infringing the power of both the judiciary and the President. Although recognizing that Congress had the power under Article III to confer or withhold the right of appeal from the Court of Claims, the Court held that the proviso was not within "the acknowledged power of Congress to make exceptions and prescribe regulation to the appellate power" because it intruded upon the independence of the judicial branch and amounted to a "rule of decision, in causes pending, prescribed by Congress. . ."

> What is this [the act] but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants . . .Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it? We think not. . .We must think that Congress has inadvertently passed the limit which separates the legislative from judicial power. It is of vital importance that these powers be kept distinct. 94/

The Klein decision, which was cited with approval by the Court in its 1962 ruling in Glidden Co. v. Zdanok, 95/ suggests that Congress must exercise its power to limit jurisdiction in a manner consistent with the independence of the judiciary.

94/ 80 U.S. (13 Wallace) at 145-147. With respect to the powers of the Presidency, the Court found the pardoning power to be granted "without limit" to the Executive and held the Congressional provision to be an unconstitutional impairment of that independent power.

95/ 370 U.S. 530 (1962).

Other cases suggest further possible limitations based on the supremacy clause of Article VI of the Constitution, which states:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

It could be argued that this constitutional provision would be a nullity if there were not a single supreme tribunal with the authority to interpret and pronounce on the meaning of the Constitution and of Federal law. Thus, Justice Taney, in Ableman v. Booth,[96] stated:

> But the supremacy thus conferred on this Government [by the supremacy clause] could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place...and the Constitution and laws and treaties of the United States, and the powers granted to the Federal Governmemt, would soon receive different interpretations in different States and the Government of the United States would soon become one thing in one State and another thing in another. It was essential, therefore, to its very existence as a Government, that...a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, should be finally and conclusively decided...And it is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the General Government in the sphere of action assigned to it; [and] to make the Constitution and laws of the United States uniform, and the same in every State.... [97]

With even more dramatic flourish Justice Story justified Supreme Court review of State court decisions as follows:

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[96] 62 U.S. (21 Howard) 506 (1858).

[97] 62 U.S. (21 Howard) at 517-18.

> A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution... [T]he appellate jurisdiction must continue to be the only adequate remedy for such evils. [98]

In other words, a Supreme Court with authority to review and revise lower and State court judgments may be constitutionally necessary to assure the national uniformity and supremacy of the Constitution and federal law.[99]

Another argument related to the above stems from the due process clause.[100] If appellate review by the Supreme Court were denied in cases involving a constitutional right, and if as a consequence different interpretations of the law developed in the various States or Federal judicial circuits, then the effect would be unequal treatment of persons similarly situated. That is, persons asserting the same right would be treated differently in different jurisdictions. This result, it has been suggested, would be "a manifest abuse of due process, one of the bases of which is equal treatment before the law."[101] Thus, appellate review may be a necessary consequence of due process, "if such an appeal is necessary to secure uniform treatment before the law."[102]

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[98] Martin v. Hunter's Lesse, 14 U.S. (1 Wheaton) 304, 347-48 (1816).

[99] For fuller development of this argument, see Ratner, "Congressional Power over the Appellate Jurisdiction of the Supreme Court," University of Pennsylvania Law Review 109: 157, 160-67 (1960). In Hart and Wechsler's famous dialogue on Congress' power over the jurisdiction of the Federal courts, the limitation asserted as to Congress' power over the Supreme Court's appellate jurisdiction is simply that "...the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan." Bator, Mishkin, Shapiro, and Wechsler, Hart and Wechsler's The Federal Courts and the Federal System , (2nd ed., 1973), p. 133.

[100] Sedler, "Limitations on the Appellate Jurisdiction of the Supreme Court," 20 University of Pittsburg Law Review 99, 113, 114 (1958).

Thus, the cases may provide less forceful precedent for the limitations imposed by NSA as they relate to the Supreme Court's appellate jurisdiction than the original jurisdiction of the inferior Federal courts. With the exception of *McCardle*, all of the cases have involved legislative limits on judicial authority with respect to claims arising from the common law or Federal statute. *McCardle* and *Yerger*, on the other hand, establish only that Congress can extinguish one means for obtaining appellate review of an asserted constitutional right when other means remain open, or conversely, that the courts will narrowly construe jurisdictional statutes when to do otherwise would have the effect of eliminating all remedies for a constitutional violation. In addition, *Klein* suggests that the Supreme Court may be less receptive to congressional mandates that intrude upon judicial independence by prescribing the manner in which the merits of a particular claim are to be viewed. Finally, fundamental constitutional limitations on Congress' power may derive from the Supreme Court's essential function in giving uniformity and national supremacy to Federal law or from due process demands that the enforcement of constitutional rights not depend on geographical location in the United States. But because of the infrequency with which Congress has acted to limit the Court's appellate jurisdiction in the past, and the consequent dearth of case law, the contours of Congress' power remain largely undetermined.

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[101] Id., at 113.

[102] Id., at 114.

It could be argued, however, that these constraints on Congress' power lose some of their force given the nature of the limitations imposed by the bill. That is, the NSA would affect the Supreme Court's appellate jurisdiction only with respect to the implementation of certain school desegregation remedies, but would not otherwise restrict its authority to review the constitutionality of school officials' actions alleged to deny equal protection of the laws, or to order such other relief as may be appropriate to remedy any violation found to exist. This relief could even include the busing of students to the extent authorized by the NSA. In addition, relief beyond that available in the Federal courts could be obtained by litigants in State courts which would remain open to school desegregation suits. The Supreme Court decisions in Swann and its progeny would continue to stand as controlling precedent in this area, presumably binding on State court judges as they ruled in related cases. In this regard, one noted commentator has suggested:

> There is, to be sure, a school of thought that argues that 'exceptions' has a narrow meaning, not including cases that have constitutional dimension; or that the supremacy or the due process clause of the fifth amendment would be violated by an alteration of the jurisdiction motivated by hostility to the decisions of the Court. I see no basis for this view and think it antithetical to the plan of the Constitution for the courts--which was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by the Constitution as 'the supreme Law of the Land. . .any Thing in the Constitution or laws of any State to the Contray notwithstanding.' Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of the government. They do so rather for the reason that they must decide a litigated

> issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land. This is, at least, what *Marbury* v. *Madison* was all about. I have not heard that it has yet been superceded, though I confess that I read opinions on occasion that do not exactly make its doctrine clear. 103/

Supporting Professor Wechsler's view is the fact that the Supremacy Clause and uniformity arguments sanctioned by the Court in *Martin* v. *Hunter's Lessee* (*supra*) and other early cases were based on an interpretation of the jurisdiction affirmatively granted or recognized by Congress in the Judiciary Act of 1789. Whether these arguments would have independent constitutional force against a Congressional denial of jurisdiction has yet to be adjudicated.

A final consideration that may affect the constitutionality of the NSA under Article III is the separation of powers limitation enunciated in *Klein*. The *Klein* principle, precluding attempted congressional interference with the judiciary in the decision of pending cases, could have implications for the NSA's limitations on judicial use of busing remedies. This may be particularly so as applied in suits by the Attorney General under §2.5(f) to reopen previously decided cases for retroactive enforcement of those remedial limits. Indeed, even more compelling reasons may support invocation of the *Klein* doctrine in the latter circumstances since it could be argued that Congress is attempting to alter or postpone the equitable effect of prior court decrees, and because of the heavy burden the duty to relitigate would place on the judicial process. In *Pope* v. *United States*,104/ the Supreme Court declined to decide under what conditions the *Klein* holding also prohibits a congressional act from setting aside a judgment in a case already decided. "We do not consider

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103/ Wechsler, "The Courts and the Constitution," 65 *Columbia L. Rev.* 1001, 1005-6 (1965).

104/ 323 U.S. 1, 8-9 (1944).

just what application the principles announced in the Klein case could rightly be given to a case in which Congress sought, pendente lite, to set aside a judgment of the Court of Claims in favor of the Government and require relitigation of the suit." However, the Court's recent decision in United States v. Sioux Nation of Indians[105] suggests that the mere fact that a congressional enactment requires relitigation of a previously decided case may not violate the separation of powers doctrine provided that the act is otherwise within Congress' constitutional powers.

Sioux Nation involved an act passed by Congress in 1978 waiving the res judicata effect of a prior judicial decision which had rejected a claim that Congress' 1877 ratification of an agreement ceding the Great Sioux Reservation, including the Black Hills, in violation of the Fort Laramie Treaty of 1868, effected a taking of Sioux lands without due process. The 1978 Act directed the Court of Claims to review de novo the merits of the Black Hill's taking claims without regard to the defense of res judicata. In holding that the statutorily mandated duty to relitigate the Sioux claims did not violate the doctrine of separation of powers, Justice Blackmun wrote for the Court:

> When Congress enacted the amendments directing the Court of Claims to review the merits of the Black Hills claim, it neither brought into question the finality of that court's judgments, nor interfered with that court's judicial function in deciding the merits of the claim. When the Sioux returned to the Court of Claims following passage of the amendment, they were in pursuit of judicial enforcement of a new legal right. Congress had not 'reversed' the Court of Claims' holding that the claim was barred by res judicata, nor, for that matter, had it reviewed the 1942 decision rejecting the Sioux claim on the merits. As Congress explicitly recognized, it only was providing a forum so that a new judicial review of

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[105] 48 U.S.L.W. 4960 (S.Ct. 6/24/80).

> the Black Hills claim could take place. This review was to be based on the facts found by the Court of Claims after reviewing all the evidence, and an application of generally controlling legal principles to those facts. For these reasons, Congress was not reviewing the merits of the Court of Claims' decisions, and did not interfere with the finality of its judgments. 106/

The legislation upheld in the Sioux Nation case, however, may be distinguishable from NSA in several relevant particulars. First, as observed by Justice Blackmun, the Act there did not purport to resolve the outcome of the Court of Claims new review of the merits of the claim. The remedial limits imposed by the NSA, on the other hand, may be outcome determinative in the sense of requiring a court to devise a new remedy utilizing less student busing than previously ordered. Secondly, Sioux Nation involved a claim against the United States and the Court found that the 1978 Act was a valid exercise of Congress' power to condition waivers of sovereign immunity of the United States. Finally, Justice Blackmun also found that the waiver of res judicta was within Congress' power under §8 of Article I of the Constitution to provide for payment of the Nation's debts. Accordingly, it is possible that the Court would take a different view with respect to retroactive application of the busing limitations in the NSA.

Related to Klein is a principle implied by several early decisions that the Article III guarantee of an independent judiciary prevents the legislature and the executive from reviewing a judicial decision. 107/ Chief Justice Taney,

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106/ 49 U.S.L.W. at 4970.

107/ E.g. Hayburns Case, 2 U.S. (2 Dallas) 408 (1792); Gordon v. United States, Appendix I, 117 U.S. 697 (1885); Muskrat v. United States, 219 U.S. 346, 354 (1911) (citing Chief Justice Taney's draft opinion as one of "great learning"). See, also Schneiderman v. United States, 320 U.S. 118, 168-9 (1943) where Rutledge, J., concurring, commented that Congress does not have authority both to confer jurisdiction and to nullify the effects of its exercise by other jurisdictional provisions in the same statute.

for instance, argued in *Gordon* v. *United States* that the award of a remedy is an essential part of the exercise of judicial power and that rendering a judgment and yet having the remedy subject to Congressional approval is not an exercise of Article III power.[108] In *Chicago* & *Southern Airlines* v. *Waterman Steamship Corp.*,[109] the Court adopted similar reasoning to deny judicial review of a presidentially reviewable order of the Civil Aeronautics Board on the ground that such dual review would violate Article III. In strong language, Justice Jackson observed that:

> Judgments within the powers vested in the courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government. [110]

Therefore, it is possible that in permitting the Supreme Court to review constitutional determinations in school desegregation cases, but denying it authority to order certain remedies, Congress may be acting beyond its powers under Article III.

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[108] Chief Justice Taney's last judicial writing stated:

> Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without remedy . . .unless Congress should at such future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this Court, in the exercise of its appellate jurisdiction; yet it is the whole power that the Court is allowed to exercise under this act of Congress. 117 U.S. at 702.

[109] 333 U.S. 103 (1948).

[110] 333 U.S. at 113-114.

[Whereupon, at 12:15 p.m., the hearing was adjourned.]

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